TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 571

LLOYD N. COBBLEDICK, INDIVIDUALLY AND AS VICE-PRESIDENT OF COBBLEDICK-KIBBE GLASS COMPANY, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 6, 1939.

CERTIORARI GRANTED DECEMBER 18, 1939.

SUPREME COURT OF THE UNITED STATES

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In the District Court of the United States of America for the Northern District of California, Southern Division.

In the Examination of Matters Now Pending Before the Grand Jury in Session in the Northern District of California, Southern Division.

PETITION

Comes now Frank J. Hennessy, United States Attorney for the Northern District of California, and respectfully prays that an order be entered directing the Clerk of this Court to issue subpoenas duces tecum, returnable November 6, 1939, directed to:

(1) Lloyd N. Cobbledick, Vice President
Cobbledick-Kibbe Glass Company
666 Howard Street
San Francisco, California

(2) Eugene Palmuth, President
Crowe Glass Company
675 Golden Gate Avenue
San Francisco, California

(3) A. H. Brawner, Officer and Director
W. P. Fuller & Company
301 Mission Street
San Francisco, California

(4) A. E. Schwartz, Officer and Director
L. H. Butcher Company
15th and Vermont Streets
San Francisco, California

commanding said officers and directors to bring and produce on behalf of the United States at the

time aforesaid before the Grand Jury sitting in the United States Courts and Post Office Building, San Francisco, California, the books, records, and documents described in the list attached hereto and made a part hereof, as Exhibit A. [1*]

And, subpoenas duces tecum returnable November 10, 1939, directed to the officers and directors of the corporations aforesaid, commanding said officers and directors to bring and produce on behalf of the United States at the time aforesaid before the grand jury sitting in the United States Courts and Post Office Building, San Francisco, California, the books, records, and documents described in the list attached hereto and made a part hereof, as Exhibit B.

FRANK J. HENNESSY
United States Attorney for the Northern District of California.

Dated at San Francisco, California, this 2nd day of November, 1939.

(Here follows duces tecum portion of subpoena.)

[Endorsed]: Filed Nov. 2, 1939. [2]

[Title of District Court and Cause.]

ORDER

On Petition of Frank J. Hennessy, United States Attorney for the Northern District of California, for Subpoenas in the above-entitled matter,

*Page numbering appearing at foot of page of original certified Transcript of Record.

It is hereby ordered that subpoenas duces tecum returnable on November 6, 1939, directed to;

(1) Lloyd N. Cobbledick, Vice President
Cobbledick-Kibbe Glass Company
666 Howard Street
San Francisco, California

(2) Eugene Palmuth, President
Crowe Glass Company
675 Golden Gate Avenue
San Francisco, California

(3) A. H. Brawner, Officer and Director
W. P. Fuller & Company
301 Mission Street
San Francisco, California

(4) A. E. Schwartz, Officer and Director
L. H. Butcher Company
15th and Vermont Streets
San Francisco, California

commanding said officers and directors to bring and produce on behalf of the United States at the time aforesaid before the Grand Jury sitting in the United States Courts and Post Office Building, San Francisco, California, the books, records, and documents described in the list attached hereto and made a part hereof,* be issued, as prayed for in said Petition; and,

It is further ordered that subpoenas duces tecum, [3] returnable November 10, 1939, directed to the officers and directors to bring and produce on be-

*Exhibit A

half of the United States at the time aforesaid before the Grand Jury sitting in the United States Courts and Post Office Building, San Francisco, California, the books, records, and documents described in the list attached hereto and made a part hereof** be issued as prayed for in said Petition.

A. F. ST. SURE
United States District Judge.

Dated at San Francisco, California, this 2nd day of November, 1939.

(Here follows duces tecum portion of subpoena.)

[Endorsed]: Filed Nov. 2, 1939. [4]

[Title of District Court.]

SUBPOENA

The President of the United States of America

To Lloyd N. Cobbledick, Vice-President
Cobbledick-Kibbe Glass Company
666 Howard Street
San Francisco, California, Greeting:

You and each of you are hereby commanded, That all and singular business and excuses being laid aside, you and each of you, be and appear in your proper person before the United States District Court, for the Northern District of California, at the Court Room, in the City and County of San

**Exhibit B.

Francisco, on the 10th day of November, A. D. 1939, at 10 o'clock in the forenoon, to Testify the Truth, and give evidence before the Grand Jury, and you are not to depart the Court without the leave of the Court or of the U. S. Attorney, and bring with you and produce at the time and place aforesaid:

All original letters, telegrams, correspondence, reports, memoranda, and other communications (or copies thereof where the originals are not in the possession of Cobbledick-Kibbe Glass Company) incoming or outgoing, exchanged by or passing, during the period from July 1, 1935 to date, between Cobbledick-Kibbe Glass Company, its officers, agents, or employees, and Sam Goodman, individually or as a representative of the Glass Jobbers' Association of San Francisco and Oakland, and relating to:

(a) The use, distribution, delivery, shipment, purchase, sale, or price of flat glass in the San Francisco Bay area.

(b) The importation of flat glass from foreign countries into the San Francisco Bay area, and the preparation of statistics in connection with such imports.

(c) The collection of statistics on the volume of business done by the larger persons, firms, and corporations engaged in the flat glass business in the San Francisco Bay area.

(d) The preparation and maintenance of a book or ledger containing a registry of flat glass jobs available in the San Francisco Bay area.

(e) Services performed by said Sam Goodman in checking prices bid on glass jobs by various bidders in the San Francisco Bay area.

(f) The protection of price structure of the large flat glass dealers in the San Francisco Bay area from efforts on behalf of the smaller flat glass dealers in said area to purchase flat glass at prices less than those established by the large dealers.

(g) The negotiation of agreements covering wages, hours, and working conditions between the Glass Jobbers' Association of San Francisco and Oakland and labor unions.

(h) Meetings between said Sam Goodman, individually or as a representative of the Glass Jobbers' Association of San Francisco and Oakland, and a representative or representatives of Cobbledick-Kibbe Glass Company, at which any of the subjects set forth in paragraphs numbered (a), (b), (c), (d), (e), (f), and (g) above were described.

And this you are not to omit, under pain of being adjudged guilty of a contempt of said Court.

Witness, the Hon. A. F. St. Sure, Judge of the United States District Court for the Northern District of California, and the seal of the said Court, this 2nd day of November, in the year of our Lord, one thousand nine hundred and thirty-nine and of the Independence of the United States of America the one hundred and sixty-fourth.

[Seal] WALTER B. MALING,

Clerk.

By J. P. WELSH,

Deputy Clerk.

MARSHAL'S RETURN

I have served this writ personally by copy on Lloyd N. Cobbledick, Vice President Cobbledick-Kibbe Glass Company, at 666 Howard Street, San Francisco, Calif., this 3rd day of November, A. D. 1939.

GEORGE VICE,

U. S. Marshal.

By WARREN D. CAIN,

Deputy.

[Endorsed]: M. D. 16000 Crim. Received Nov. 2, 1939. U. S. Marshal's Office, San Francisco, Calif.

[Endorsed]: Filed Nov. 3, 1939. [5]

In the District Court of the United States for the Northern District of California, Southern Division.

No. 2679

In the Matter of the Subpoena Returnable Before the Grand Jury Impaneled by the Honorable A. F. St. Sure, Judge of the above entitled Court, during the July term thereof, which Subpoena was issued out of and over the seal of said Court on November 2, 1939, directed to Lloyd N. Cobbledick, Vice President Cobbledick-Kibbe Glass Company, 666 Howard Street, San Francisco, California.

ORDER SHORTENING TIME

Good cause being shown,

It is hereby ordered that service of the motion and notice [6] of motion to quash the subpoena duces tecum on file herein may be made by serving a copy of said motion and of this order upon Morris R. Clark, Esq., or upon any special assistant to the attorney general in his office, or upon the office of the United States Attorney for the Northern District of California, not later than 12 M. on the 8th day of November, 1939, at San Francisco, California, and the court hereby dispenses with other, further and different notice of the hearing of said motion.

It is further ordered that said motion shall be forthwith placed on the law and motion calendar

for hearing on Thursday, the 9th day of November, 1939, at the hour of 10 o'clock A. M., or as soon thereafter as counsel may be heard.

Dated: November 8, 1939.

A. F. ST. SURE,
United States District Judge.

(Admission of service.)

[Endorsed]: Filed Nov. 8, 1939. [7]

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION TO QUASH SUBPOENA DUCES TECUM. [8]

To the United States of America and to James V. Hayes, Esq., and Morris R. Clark, Esq., Special Assistants to the Attorney General of the United States, its attorneys:

Please take notice that on Thursday, November 9, 1939, at the hour of 10 o'clock A.M., or as soon thereafter as counsel can be heard, Lloyd N. Cobbledick, individually and as vice president of Cobbledick-Kibbe Glass Company, a California corporation, and Cobbledick-Kibbe Glass Company, a California corporation, will move the Honorable, the above entitled court in the courtroom of the Honorable A. F. St. Sure, Judge thereof, in the Post Office Building, San Francisco, California, for an order with reference to the above described subpoena (a copy of which was handed to and left with said

Lloyd N. Cobbledick, on or about November 3, 1939, and a copy of which is attached to the memorandum of points and authorities on file herein) as follows:

1. Quashing and vacating said subpoena;

2. Quashing and vacating the paragraph of said subpoena requiring the production of certain documents as purportedly described therein;

3. For such other and further relief as may be meet and proper in the premises.

Said motion will be made by the moving parties jointly and by each of them severally and will be made on the following grounds, severally and collectively:

1. Said subpoena duces tecum is oppressive, unreasonable and invalid because it does not call for documents but for information. The production of a document as purportedly called for by said subpoena would be tantamount to testimony that the document so produced passed between the parties described in said subpoena and related to the subjects enumerated therein;

2. The enforcement of said subpoena for testimonial [9] purposes would require the party on whom the subpoena was served to testify against himself, contrary to the Fifth Amendment;

3. Said subpoena cannot compel the witness to go through a file of papers to ascertain which ones "relate to" matters stated therein;

4. Said subpoena is oppressive, unreasonable and invalid because there is no showing by said

subpoena, or otherwise, of the materiality or pertinence of the documents sought to be produced to any issue which the Federal Grand Jury has jurisdiction to consider;

5. Said subpoena is oppressive, unreasonable and invalid in that it asks for documents without regard to whether they relate to interstate or intrastate actions. Matters of intrastate commerce are beyond the jurisdiction of the Federal Grand Jury and beyond the reach of any subpoena issued in connection with its investigations;

6. Enforcement of said subpoena for testimonial purposes without any showing of the materiality or evidentiary value of the documents sought to be produced, and without any showing that they relate to matters within the jurisdiction of the Federal Grand Jury, would constitute an unlawful search and seizure contrary to the Fourth Amendment;

7. The enforcement of such subpoena would result in taking the property of the moving parties without compensation and without due process of law, contrary to the Fifth Amendment.

Said motion will be based on all records and files of this court relating to the Grand Jury investigation in connection with which said subpoena duces tecum was issued, on this motion and notice of motion, on the memorandum of points and authorities filed herewith and the copy of said subpoena attached thereto, on the affidavit of Lloyd N. Cobble-

dick filed herein, and upon such oral testimony and other evidence as the court may permit [10] to be offered at the hearing herein.

Dated: San Francisco, California, November 7, 1939.

CHALMERS G. GRAHAM,
FELIX T. SMITH,

Attorneys for Lloyd N. Cobbledick, individually and as Vice President of Cobbledick-Kibbe, Glass Company, a corporation, and for Cobbledick-Kibbe Glass Company, a corporation.

CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco,
PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco,
Of Counsel.

(Admission of service.)

[Endorsed]: Filed Nov. 8, 1939. [11]

[Title of District Court and Cause.]

AFFIDAVIT OF LLOYD N. COBBLEDICK IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM. [12]

State of California,
City and County of San Francisco—ss.

Lloyd N. Cobbledick, being duly sworn, deposes and says that he is Vice President and a director of Cobbledick-Kibbe Glass Company, with offices located at 666 Howard Street, San Francisco, California; that he is familiar with the operation of the business of said company, but that many of the letters, telegrams, correspondence, reports, memoranda, and other communications called for by the subpoena duces tecum issued under the seal of the court, directed to affiant, and returnable November 10, 1939, are not matters of which affiant has personal knowledge; and that a large part of the letters, telegrams, correspondence, reports, memoranda and other communications contained in the files of said Cobbledick-Kibbe Glass Company are not identified in such a way that it can be ascertained upon the face thereof whether or not they constitute letters, telegrams, correspondence, reports, memoranda or other communications passing between Cobbledick-Kibbe Company, its officers, agents, or employees and Sam Goodman, or relating to any of the subjects enumerated in said subpoena.

Dated: San Francisco, California, November 7, 1939.

LLOYD N. COBBLEDICK.

Subscribed and sworn to before me this 7th day of November, 1939.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California.

(Admission of service.)

[Endorsed]: Filed Nov. 8, 1939. [13]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM. [14]

(1) The subpoena duces tecum in the instant case is oppressive, unreasonable and invalid, because it does not call for documents but for information. The production of a document as called for by the subpoena would be tantamount to testimony that the document so produced passed between the parties described in the subpoena and related to the subjects therein enumerated.

A subpoena duces tecum is mechanical—not testimonial—in operation. It commands production of specific documents rather than the exercise of discretion or judgment by the witness. The witness' duty is to examine the subpoena and produce the very paper therein described.

"The duty of a witness under the writ as regulated by statute is simply to bring a specified paper to a designated place. Under a writ ad testificandum a party cannot make a man his lawyer, or physician, or scientific instructor by subpoenaing him as an * * * expert. Under neither writ is he entitled to the judgment, discretion, opinion or professional service of the witness."

Elting v. United States, 27 Ct. Cl. 158, 165.

The subpoena in the instant case does not describe any document with particularity but is obviously an attempt to determine whether any correspondence did pass between the parties described therein and to determine whether any of such correspondence, if it exists, relates to any of the special subjects enumerated therein. Essentially, what the subpoena calls for is information as to the existence of certain correspondence and the existence of certain factual situations. In other words, it seeks facts rather than documents.

" * * * * the subpoena duces tecum is not proper to be used for the purpose of obtaining facts or information * * * or general inquisitorial examination of books * * * with a view to ascertaining whether something of value may not show up * * * ."

70 C. J. 51, sec. 37.

See, for example, as an illustration of the violation of [15] this principle by the present subpoena.

subparagraph (f) thereof, requiring the production of correspondence relating to the protection of the price structure of the large flat glass dealers in the San Francisco Bay area from efforts on behalf of the smaller flat glass dealers in said area to purchase flat glass at prices less than those established by the large dealers.

The Supreme Court of the United States, affirming refusal of a trial court to issue a subpoena duces tecum requiring the registrar of voters to furnish the number of white voters, of colored voters, and total number of voters who could sign their names, who had voted at the preceding congressional election, said:

> "The court was of opinion that either the defendant should have specified the books or documents required; or, *if he wished information* from the registrar, he should have subpoenaed him to attend and testify. We perceive no error in this action."
>
> Murray v. Louisiana, 163 U. S. 101, 107.

(2) Using the subpoena for testimonial purposes would require the party on whom the subpoena was served to testify against himself contrary to the Fifth Amendment.

There are, of course, authorities holding that a corporate officer cannot refuse to produce corporate records on the ground that they might tend to incriminate him personally. The situation contemplated by that rule is the production of documents in response to a proper subpoena, in which the ex-

istence of the documents sought are known and the documents are described with particularity. The rule is not applicable to situations like the present one, in which the mere attempt to comply with the requirements of the subpoena would constitute testimony, that is, either an affirmance or a denial of the existence of the documents sought and of their relevance to the particular subjects enumerated in the subpoena. The use of a subpoena for such testimonial purposes and in such a [16] way that the party upon whom the subpoena was served has no opportunity to make claim of immunity constitutes in a very real sense the giving of testimony against himself in violation of his constitutional rights under the Fifth Amendment to the Constitution.

(3) A subpoena duces tecum cannot compel a witness to go through a file of papers to ascertain which ones "'relate to" matters stated in the subpoena. Because this objection is very similar to the objection that a subpoena cannot be used for testimonial purposes, the case of Elting v. United States, 27 Ct. Cl. 158, 165, supra, is again pertinent. It was held therein that a party seeking documents or information by means of a subpoena duces tecum cannot compel the party on whom the subpoena is served

> "to go through a mass of papers and select those which in his [the witness's] judgment relate to the subject of litigation; *neither can he cast on the witness the responsibility of say-*

ing what papers do, and what papers do not, bear upon the issue to be tried" (italics ours).

In Rawlins v. Hall-Epps Clothing Co. (5th C.C.A., 1914), 217 Fed. 884, the court had before it orders for examination of the bankrupts and in disapproving of the scope of the orders, said (p. 887):

> "They are required, by its terms, to determine at their peril what books of account and other writings and memoranda are material to the ascertainment of any of the matters mentioned in the order and to be covered in the examination.
>
> We think this was requiring too much of the bankrupts. They should have been apprised by the order itself what specific books, writings, and memoranda they were required to produce."

See also:

Mobile Gas Co. v. Patterson (D.C., Ala., 1923) 288 Fed. 884, 886.

(4) The subpoena duces tecum is objectionable because there is no showing by the subpoena, or otherwise, of the materiality [17] or pertinence of the documents sought to be produced to any issue which the Federal Grand Jury has jurisdiction to consider.

As said by Mr. Justice Holmes, in Fed. Trade Comm. v. Amer. Tobacco Co. (1924), 264 U.S. 298,

a case involving an attempt to compel disclosure of records to the Federal Trade Commission in a Sherman Act proceeding (p. 306):

> "The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer. Wigram, Discovery, 2d. ed., sec. 293. We assume that the rule to be applied here is more liberal but still a ground must be laid and the ground and the demand must be reasonable. Essgee Co. v. United States, 262 U.S. 151, 156, 157. A general subpoena in the form of these petitions would be bad."

In Carpenter v. Winn (1911), 221 U.S. 533, a grand jury case, the court said, with reference to bills of discovery, that such a bill (p. 540):

> "* * * cannot be used merely for the purpose of enabling the plaintiff in such a bill to pry into the case of his adversary to learn its strength or weakness. A discovery sought upon suspicion, surmise or vague guesses is called 'a 'fishing bill,' and will be dismissed. * * * Such a bill must seek only evidence which

is *material* to the support of the complainant's own case, and prying into the nature of his adversary's case will not be tolerated" (italics ours).

The same idea was expressed by Mr. Justice Cardozo, when on the Court of Appeals, in People v. Supreme Court (N.Y., 1927), 156 N.E. 84, wherein he said (p. 85):

"Documents are not subject to inspection for the mere reason that they will be useful in supplying a clew whereby evidence can be gathered. Documents to be subject to inspection must be *evidence* themselves" (citing cases) (italics ours).

See, generally:

Fed. Trade Comm. v. Amer. Tobacco Co. (1924), 264 U. S. 298, 305 (supra); [18]
United States v. Terminal R. Ass'n. (C.C., Mo., 1907), 154 Fed. 268, collecting cases;
Third Nat. Bank & Trust Co. v. United States (6th C.C.A., 1931), 53 F. (2d) 599;
United States v. Aluminum Co. of America (D.C. N.Y., 1939), 26 F. Supp. 711.

(5) The subpoena duces tecum is oppressive, unreasonable and invalid in that it asks for documents without regard to whether they relate to interstate or intrastate transactions. Matters of intrastate commerce are beyond the jurisdiction of the Federal Grand Jury, and beyond the scope of any subpoena issued in connection with its investigation.

In Fed. Trade Comm. v. Amer. Tobacco Co., 264 U.S. 298, supra, the court said (p. 307):

> "The demand was not only general but extended to the records and correspondence concerning business done wholly within the State. This is made a distinct ground of objection. We assume for present purposes that even some part of the presumably large mass of papers relating only to intrastate business may be so connected with charges of unfair competition in interstate matters as to be relevant, Stafford v. Wallace, 258 U.S. 495, 520, 521, but that possibility does not warrant a demand for the whole."

To the same effect, see Federal Trade Commission v. Smith (D.C., N.Y., 1929), 34 F. (2d) 323, 324.

(6) Enforcement of subpoena duces tecum for testimonial purposes, without any showing of the materiality of the documents sought to be produced and without any showing that they relate to matters within the jurisdiction of the Federal Grand Jury, would constitute an unlawful search and seizure contrary to the Fourth Amendment.

A corporation may, of course, be compelled by *due and lawful process* to produce its books and papers; if the requirements, however, of a subpoena duces tecum requiring such production are [19] not confined *"within limits which reason imposes in the circumstances of the case,"* it is not "due and lawful" in that the constitutional guaranty against unreasonable search is thereby violated.

The unlimited and unreasonable requirements of the process here involved have been hereinbefore pointed out. It specifies no particular paper but requires an indiscriminate search through the corporation's records, relevant or irrelevant, in the hope that something will turn up.

In a case cited with approval in Hale v. Henkel, 201 U.S. 43, the Supreme Court of Missouri said:

> "To permit an indiscriminate search among all the papers in one's possession for no particular paper, but some paper, which may throw some light on some issue involved in the trial of some cause pending, would lead to consequences that can be contemplated only with horror, and such a process is not to be tolerated among a free people. A grand jury has a general inquisitorial power. They may ask a witness * * * without reference to any particular offense which is the subject of inquiry, what he knows touching the violation of any section of the criminal code. Give such a body, in addition, the power to search any man's papers for evidence of some crime committed, and you convert it into a tribunal which would soon become as odious to American citizens as the Star Chamber was to Englishmen, or the Spanish Inquisition to the civilized world."

Ex Parte Brown, 72 Mo. 83, 94.

See, also:

Fed. Trade Comm. v. Amer. Tobacco Co., 264 U.S. 298, 306;

Bank of America v. Douglas (D.C., App.), 105 F. (2d) 100, 106-107;

Go-Bart Co. v. United States, 282 U.S. 344, 356-357.

(7) Enforcement of said subpoena would result in the taking of property of the moving party without compensation and [20] without due process of law, contrary to the Fifth Amendment.

Dated: San Francisco, California, November 8, 1939.

Respectfully submitted,

CHALMERS G. GRAHAM,
FELIX T. SMITH,
Attorneys for Lloyd N. Cobbledick, individually and as Vice President of Cobbledick-Kibbe Glass Company, a corporation, and for Cobbledick-Kibbe Glass Company, a corporation.

CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco,
PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco,
Of Counsel:

(Here follows a copy of the subpoena duces tecum.)

(Admission of service.)

[Endorsed]: Filed Nov. 8, 1939. [21]

In the District Court of the United States of America for the Northern District of California, Southern Division.

No.

In the Matter of the Subpoena Returnable Before the Grand Jury Impaneled by the Honorable A. F. St. Sure, Judge of the above entitled Court, during the July term thereof, which Subpoena was issued out of and over the seal of said Court on November 2, 1939, directed to Lloyd N. Cobbledick, Vice President of Cobbledick-Kibbe Glass Company, 666 Howard Street, San Francisco, California.

No.

In the Matter of the Subpoena Returnable Before the Grand Jury Impaneled by the Honorable A. F. St. Sure, Judge of the above entitled Court, during the July term thereof, which Subpoena was issued out of and over the seal of said Court on November 2, 1939, directed to A. H. Brawner, Officer and Director, W. P. Fuller & Company, 301 Mission Street, San Francisco, California.

No.

In the Matter of the Subpoena Returnable Before the Grand Jury Impaneled by the Honorable A. F. St. Sure, Judge of the above entitled Court, during the July term thereof, which Subpoena was issued out of and over the seal

of said Court on November 2, 1939, directed to Eugene Palmuth, President Crowe Glass Company, 675 Golden Gate Avenue, San Francisco, California.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTIONS TO QUASH SUBPOENAS DUCES TECUM. [22]

SUMMARY OF POINTS AND AUTHORITIES

1. The Subpoena herein is reasonable and proper and is not unduly oppressive, and, in numerous instances, the Federal Courts have upheld Subpoenas Duces Tecum which were much broader in scope.

   Brown v. United States, 276 U. S. 134 (1928)
   Consolidated Rendering Company v. Vermont, 207 U. S. 541 (1908)
   Nelson v. United States, 201 U. S. 92 (1906)
   In re Investigation Conducted by the Attorney General, 27 Fed. Supp. 997 (D.C. S.D. N.Y., 1939)
   United States v. Medical Society, 26 Fed. Supp. 55 (D.C. D.C., 1938)
   In re The Petition of the Borden Company (an unreported opinion D.C. W.D. Ill. 1938)
   Norcross v. United States, 209 Fed. 13 (C. C. A. 9, 1913)

2. An officer of a corporation served with a Subpoena Duces Tecum to produce books and rec-

ords of the corporation cannot refuse to produce the records upon the grounds that the documents produced would tend to incriminate the corporation or himself.

Essgee Company v. United States, 262 U. S. 151 (1923)

Dreier v. United States, 221 U. S. 394 (1911)

Wilson v. United States, 221 U.S. 361 (1911)

Wheeler v. United States, 226 U. S. 478 (1913)

Grant and Burlingame v. United States, 227 U.S. 74 (1913)

3. The Subpoena Duces Tecum herein questioned does not constitute an unreasonable search and seizure in violation of the Fourth Amendment, nor deprivation of property without due process of law within the meaning of the Fifth Amendment.

Nelson v. United States, 201 U. S. 92 (1906)

Consolidated Rendering Company v. Vermont, 207 U. S. 541 (1908) [23]

Norcross v. United States, 209 Fed. 13, (C. C. A. 9, 1913)

In re Investigation Conducted by the Attorney General, 27 Fed. Supp. 997 (D.C. S.D. N.Y. 1939)

In re Petition of the Borden Company (an unreported opinion, D. C. N.D. Ill., 1938)

Essgee Company v. United States, 262 U. S. 151 (1923)

4. The use of the term "relating to" is sufficiently definite to enable the parties subpoenaed to determine what documents are called for. It is not necessary that each document, book, record, memorandum or paper be separately and individually described, provided that such subjects and subject matters are specifically enumerated and described and there is proper limitation as to the period of time which the documents called for are to cover.

Brown v. United States, 276 U.S. 134 (1928)
Nelson v. United States, 201 U.S. 92 (1906)
Consolidated Rendering Company v. Vermont, 207 U.S. 541 (1908)
Norcross v. United States, 209 Fed. 13 (C. C. A. 9, 1913)
United States v. Medical Society, 26 Fed. Supp. 55 (D.C. D.C., 1938)
In re Investigation Conducted by the Attorney General, 27 Fed. Supp. 997 (D.C. D.S. N.Y. 1939)
In re Petition of the Borden Company (an unreported opinion D.C. W.D. Ill., 1938)

5. One Subpoenaed Duces Tecum in connection with a grand jury investigation under the anti-trust laws has no standing to challenge the grand jury's jurisdiction and cannot refuse to produce called-for documents on the grounds that some

of the transactions to which they relate are of an intrastate character.

Blair v. United States, 250 U.S. 273 (1919)
In re Medical Association, Chicago, Illinois, 26 Fed. Supp. 58, (D.C. D.C. 1938) [24]

6. Where Subpoenas Duces Tecum are issued to compel the production of documentary evidence before a grand jury, no showing as to relevancy and materiality of such evidence is required prior to the issuance of such subpoenas, or apart from the Duces Tecum clause therein contained. The materiality of evidence sought to be secured by Subpoenas Duces Tecum is a matter for determination not by those who may be subpoenaed, but the court in the light of the nature of the investigation, and with the widest latitude permitted to the Government.

Nelson v. United States, 201 U. S. 92 (1906)
Norcross v. United States, 209 Fed. 13 (C. C. A. 9, 1913)
In re Subpoenas Duces Tecum, 248 Fed. 137 (D.C. E.D. Tenn. S.D. 1916)
In re Black, 47 Fed. (2d) 542 (C.C.A. 2d, 1931)
Brown v. United States, 276 U. S. 134 (1928)
Blair v. United States, 250 U. S. 273 (1919)
Wilson v. United States, 221 U.S. 361 (1911)

7. Not a single case cited by movants in support of their motions to quash involved grand jury

investigations. Thus they are not authority in support of the present motions.

(a) The cases relied upon by movants and the type of proceedings involved therein are as follows:

Elting v. United States, 27 Ct. Cl. 158, 163 (Court of Claims)

Federal Trade Commission v. American Tobacco Company, 264 U. S. 298 (1924) (Federal Trade Commission)

Rawlins v. Hall Epp Clothing Company, 217 Fed. 884 (C.C.A. 5, 1914) (Bankruptcy)

Mobile Gas Company v. Patterson, 280 Fed. 884, 886 (D.C. Ala., 1923) (Bankruptcy)

Carpenter v. Winn, 221 U. S. 533 (1911) (Equity)

United States v. Terminal R. R. Association, 154 Fed. 268 (C.C. Mo., 1907) (Equity)

Third National Bank & Trust Company v. United States, 53 Fed. (2d) 599 (C.C.A. 6, 1931) (Equity) [25]

United States v. Aluminum Company of America, 26 F. Supp. 711 (D.C. S.D. N.Y. 1939) (Equity)

Federal Trade Commission v. Smith, 34 Fed. (2d) 323, 324 (D.C. N.Y. 1929) (Federal Trade Commission)

Go-Bart Company v. United States, 282 U.S. 344, 356-357 (1931) (Civil action for an injunction against use of evidence obtained on search warrant)

Bank of America v. Douglas, 105 Fed. (2d) 100, 106-107 (App. D.C. 1939) (Securities Exchange Commission)

Murray v. Louisiana, 163 U. S. 101, 107 (1890) (Action at law to Quash an Indictment)

People v. Supreme Court, 156 N. E. 84 (N.Y. 1927) (Action at law to compel production of evidence)

(b) The case of Carpenter v. Winn, 221 U. S. 533 (1911) which movants on page 5 of their memoranda of points and authorities in support of motions to quash expressly state was a grand jury case, did not involve a grand jury investigation. The nature of that case was set forth by the court in its opinion (p. 537):

> "The question is whether under Section 724 of the Revised Statutes, a court of law may compel one party to an action to produce, in advance of the trial, books and papers for examination and inspection by his adversary."

Respectfully submitted,

JAMES V. HAYES
MORRIS R. CLARK
JOHN V. LEDDY
SAM E. NEEL
ROBERT DILLER
GEORGE F. FISHER, JR.
Special Assistants to the Attorney General.

[Endorsed]: Filed Nov. 9, 1939. [26]

District Court of the United States, Northern District of California, Southern Division.

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 9th day of November, in the year of our Lord one thousand nine hundred and thirty-nine.

Present: the Honorable A. F. St. Sure, District Judge.

No. 2679
(Miscellaneous)

In the Matter of the Motions of Lloyd N. Cobbledick, Vice President of Cobbledick-Kibbe Glass Co., and Cobbledick-Kibbe Glass Co., A. H. Brawner, officer and director of W. P. Fuller & Co., and W. P. Fuller & Co., and Eugene Palmuth, President of Crowe Glass Co., and Crowe Glass Co., to quash Subpoenas Duces Tecum to appear before the United States Grand Jury, July 1939 term of this Court.

The motions of Lloyd N. Cobbledick, Vice President of Cobbledick-Kibbe Glass Co., and Cobbledick-Kibbe Glass Co., A. H. Brawner, Officer & Director of W. P. Fuller & Co., and W. P. Fuller & Co., and Eugene Palmuth, President of Crowe Glass Co., and Crowe Glass Co., to quash subpoenas duces tecum to appear before the United States Grand Jury, July 1939 term of this Court, came on regularly this day for hearing. Felix T. Smith,

Esq., and Chalmers G. Graham, Esq., appearing as attorneys for the moving parties, and James V. Hayes, Esq., and Morris R. Clark, Esq., Special Assistants to the Attorney General, appearing upon behalf of the United States.

The various motions were argued by Mr. Smith and Mr. Hayes and submitted to the Court for consideration and decision. Now, after due consideration had thereon, it is ordered that each of said motions to quash be and the same are hereby denied, and to which ruling the moving parties were allowed an exception.

Mr. Smith thereupon gave oral Notice of Appeal upon behalf of each of the moving parties. Mr. Smith moved the Court to grant a stay of execution herein. After hearing Mr. Smith and Mr. Hayes, it is ordered that each of the moving parties be allowed until November 13, 1939, within which time to prepare, serve and file their appeal papers.

[27]

In the Southern Division of the United States District Court, in and for the Northern District of California.

Before: HON. A. F. ST. SURE, Judge.

No. 2679—Misc.

In the Matter of the Petitions of LLOYD N. COBBLEDICK, Vice-President of Cobbledick-Kibbe Glass Company, A. H. BRAWNER, Vice-President and Director W. P. Fuller & Co., and EUGENE PALMUTH, President Crowe Glass Company, to Quash Subpoenaes Duces Tecum to Appear Before U. S. Grand Jury July 1939 Term of this Court.

TESTIMONY

Friday, November 10, 1939.

Counsel Appearing:

For the United States: James V. Hayes, Esq. and Morris R. Clark, Esq., Special Assistants to the Attorney General of the United States.

For the Petitioners: Felix T. Smith, Esq., Chalmers G. Graham, Esq., Henry G. Hayes, Esq.

Mr. Henry G. Hayes: As your Honor knows, yesterday the motions to quash subpoenaes duces tecum before the Grand Jury were argued and were denied.

The Court: Yes.

Mr. Henry G. Hayes: At that time Mr. Smith gave notice of appeal, and asked for a stay, and your Honor was uncertain as to whether your Honor had jurisdiction to enlarge the time for appearance before the Grand Jury. As you know, Mr. Felix Smith wrote you a letter, of which a copy has been handed to counsel for the Government, submitting authorities——

The Court: I haven't seen the letter. It is probably on my desk. [28]

Mr. James W. Hayes: Here is a copy supplied to the Government, your Honor.

The Court: In the letter Mr. Smith says he admits the Court has the power to make an appropriate order to preserve the status quo. What do you wish to say about it? The only question is whether or not the Court will make the order.

Mr. Henry G. Hayes: Well, it is a matter for the Court, your Honor, but our feeling is that an appearance by the witnesses to-day would, in reality, be an appearance pending the appeal.

The Court: I don't know whether I would want to make any order at all. It would depend on what the Government thinks about the matter. In other words, if the Government is prepared to go ahead with the witnesses, the Grand Jury is in session, and I might conclude the hearing should go ahead.

Mr. Henry G. Hayes: Despite the pendency of the appeal, your Honor? I would say that makes the appeal valueless.

The Court: I don't think there is anything in the point that Mr. Smith makes at this time.

Mr. Henry G. Hayes: Well, we, of course, feel, first, your Honor, that if we ask——

The Court: I understand. I believe you are acting in good faith in the matter.

Mr. Henry G. Hayes: I might suggest, your Honor, as Mr. Smith did in his letter, I believe, that in the Grand Jury case down South an enlargement of time in the District Court was obtained by stipulation of counsel, and when the case got up into the Circuit Court of Appeals the time was enlarged in the Circuit Court. [29]

The Court: I don't know how the Government feels about the matter. Do you want to continue with the proceedings?

Mr. James V. Hayes: Yes, your Honor. The Grand Jury is presently waiting for us to appear before it.

The Court: Well, you have looked into the case, have you?

Mr. James V. Hayes: Yes, we have, your Honor. The law, as we see it, first of all the cases cited by counsel do not have anything to do with any duty on the Court——

The Court: No, I think the Court——

Mr. James V. Hayes: We don't believe there is any question in regard to the Court's power to control the Grand Jury.

The Court: I think I could do that. The only thought I had was whether or not I wanted to continue the matter, hold up further proceedings before the Grand Jury, whether or not I would have the power to do that.

Mr. Henry G. Hayes: Your Honor, as I recall, counsel will check me, I think, that you made a suggestion yesterday of continuing the matter until Monday if you felt you had the jurisdiction to do that.

The Court: Well; I did not—all I said to Mr. Smith was to take his appeal, and he promised me he would do that.

Mr. Henry G. Hayes: Yes; that was filed this morning, your Honor.

The Court: And that has been attended to. I can't see any good reason to hold up the proceedings of the Grand Jury.

(After discussion a recess was taken until 11:30 A. M.)

The Court: Well, gentlemen, is there anything further you wish to say to the Court about this matter?

Mr. Felix Smith: Well, your Honor, our position is that we [30] have a serious question, and a very difficult question. As a matter of fact, if your Honor should order these witnesses to produce these documents I would have the gravest difficulty, myself, in

telling them what they ought to produce, in that it is impossible to tell from this subpoena what the duties of the witness are. We think that is a serious matter, and we should be allowed to present it to the Circuit Court of Appeals. I realize your Honor does not sympathize with our view, but I think we should be permitted to present that matter to the Court in the regular way.

Now, if your Honor does not wish to make a stay, of course, that is within your Honor's discretion, but I think your Honor ought to permit us to make an application to the Circuit Court of Appeals for a stay.

The Court: Well, how much time do you want for that?

Mr. Smith: Well, I believe that will have to rest within the judgment of the Circuit Court of Appeals. I can go into the Circuit Court of Appeals and try to see the Presiding Justice this morning. I don't know whether he is even in town. I could confer with him this morning. I think he should have very definite ideas about when the Court could hear a motion of that kind.

The Court: It would seem now that it would be a mistake for this Court to hold up the proceedings of the Grand Jury until your appeal is decided.

Mr. Smith: I realize that is the attitude your Honor has. As I say, I would want to expedite the appeal, but I think that, holding your Honor's view, your Honor still would feel that it was the proper

thing to allow sufficient time to make an application to the Circuit Court of Appeals.

The Court: Yes. I am wondering how much time would be [31] necessary for you to do that. It is almost twelve o'clock now, twenty-five minutes to twelve.

Mr. Smith: Yes.

The Court: Tomorrow is a legal holiday, it is a national holiday, and then comes Sunday. I wonder how long——

Mr. Smith: It might be the Circuit Court of Appeals in an application of this kind would hear it Monday morning. I assume that counsel for the United States would co-operate with us in having a matter of that kind taken up promptly?

The Court: Yes. Perhaps it would be well if the United States Attorney and you and myself go and see the Senior Circuit Judge of the Court of Appeals.

Mr. Smith: I hate to impose upon your Honor that way, but that would, I think——

The Court: Oh, no, no.

Mr. Smith (Continuing). —be the most expeditious way of attending to the matter.

The Court: We may impress upon the Court the necessity of hearing the matter at an early date. Do you see any objection to that?

Mr. James V. Hayes: I see no objection to it, your Honor, if such an application should be made to the Circuit Court of Appeals to-day, but I would

freely consent to an adjournment of the subpoenaes if I believed there was any merit in the argument advanced. Convinced, as I am, that there is no merit in it, and with the Grand Jury actually sitting, waiting for the witnesses, and seeking to conclude its investigation, and feeling that this is an effort to secure further delay, I don't feel I can, in conformance with my duty in the circumstances, make any consent which would require a longer delay than certainly Monday.

The Court: Well, I wouldn't ask any consent. I wouldn't ask [32] you to consent, but I am wondering what the best thing to do under the circumstances would be. We can see Judge Wilbur at this time and ask him if he can take it up on Monday.

Mr. Smith: Shall I see if he is there, your Honor?

The Court: I say, we can go and see him.

Mr. Smith: I see, your Honor.

(After recess):

The Court: Since we conferred with Judge Wilbur I take it, gentlemen, that there will be no objection to the Court's adjourning the subpoenaes before the Grand Jury until next Wednesday morning at ten o'clock.

Mr. James V. Hayes: That is correct, your Honor.

The Court: Is there anything further you wish to say?

Mr. James V. Hayes: Except this, that that agreement by the Government was on the condition that counsel submit a brief and record to the Circuit

Court on Monday and ask for a hearing on the merits. The Government will have its brief ready at the same time.

The Court: Mr. Smith, you desire a hearing at the earliest time, do you not?

Mr. Smith: Yes, your Honor. It will have to be a typewritten brief and transcript.

The Court: Yes. I think there will be no question about the Court permitting you to proceed that way, in so far as the record is concerned.

Mr. Smith: Your Honor, I will have a typewritten transcript and brief ready Monday.

Mr. James V. Hayes: The Government will be ready with its brief on Monday.

Mr. Smith: May I suggest the record in the Circuit Court of Appeals will be better if the Court makes an order denying [33] my motion to stay the proceedings under the three subpoenaes duces tecum and continue the return date on the subpoenaes until Wednesday morning.

The Court: Motion is denied and an exception noted. [34]

CERTIFICATE OF OFFICIAL PHONOGRAPHIC REPORTER

State of California,
City and County of San Francisco—ss.

I, Kenneth G. Gagan, hereby certify that I am an official shorthand reporter of the United States District Court for the Northern District of California,

and that as such reporter I took down in shorthand writing on the 10th day of November, 1939, the proceedings had in the matter entitled in the caption hereof, fully, truly and correctly, to the best of my ability; that I thereafter caused my said shorthand writing to be transcribed into typewriting, and that the foregoing 7 pages constitute said transcript; that the same is a full, true and correct transcription of my said shorthand notes aforesaid, and is a full, true, accurate and correct transcription of said proceedings in said matter.

Dated, San Francisco, Calif., November 10, 1939.

KENNETH G. GAGAN,
Official Shorthand Reporter.

[Endorsed]: Filed Nov. 10, 1939. [35]

[Title of District Court.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 10th day of November, in the year of our Lord one thousand nine hundred and thirty-nine.

Present: the Honorable A. F. St. Sure,
District Judge.

[Title of Cause.]

In this matter Felix T. Smith, Esq., Attorney for the moving parties herein, moved the Court to stay

proceedings on Subpoenas Duces Tecum issued to—
Lloyd N. Cobbledick, Vice President of Cobbledick-Kibbe Glass Co.,
A. H. Brawner, Officer & Director of W. P. Fuller & Co., and
Eugene Palmuth, President of Crowe Glass Co.,

requiring them, and each of them, to appear before the United States Grand Jury, July 1939 Term of this Court.

After hearing Mr. Smith and James V. Hayes, Esq., Special Assistant to the Attorney General, in opposition thereto, It Is Ordered that said motion be and the same is hereby Denied. The moving parties were allowed an exception to the ruling of the Court.

Further ordered that the return day of each subpoena be extended until Wednesday, November 15, 1939, at 10 o'clock a. m. [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL [37]

Notice is hereby given that Lloyd N. Cobbledick, individually, Lloyd N. Cobbledick, Vice President, Cobbledick-Kibbe Glass Company, a California corporation, and Cobbledick-Kibbe Glass Company, a California corporation, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the District Court of the

United States for the Northern District of California, Southern Division, made November 9, 1939, denying the motion of Lloyd N. Cobbledick, individually, and as Vice President of Cobbledick-Kibbe Glass Company, a California corporation, and of said Cobbledick-Kibbe Glass Company, a California corporation, to quash and vacate each paragraph and each lettered subdivision of each paragraph of that certain subpoena duces tecum directed to said Lloyd N. Cobbledick, Vice President, Cobbledick-Kibbe Glass Company; issued out of and under the seal of said District Court of the United States under date of November 2, 1939, which said order was entered on or about November 9, 1939.

Dated: San Francisco, California, November 9, 1939.

CHALMERS G. GRAHAM
Robert Dollar Building,
San Francisco, California.
Telephone: Garfield 8700.
FELIX T. SMITH
Standard Oil Building,
San Francisco, California.
Telephone: Garfield 6133.
Attorneys for Lloyd N. Cobbledick, individually, Lloyd N. Cobbledick, Vice President, Cobbledick-Kibbe Glass Company, and Cobbledick-Kibbe Glass Company.

PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco, California.
CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco.
Of Counsel.

[Endorsed]: Filed Nov. 10, 1939. [38]

BOND

Know All Men By These Presents:

That we, Lloyd N. Cobbledick, individually and as vice president of Cobbledick-Kibbe Glass Company, a corporation organized and existing under and by virtue of the laws of the State of California, having an office and place of business at 666 Howard Street, City and County of San Francisco, State of California, and said Cobbledick-Kibbe Glass Company, a corporation as aforesaid, as principals, and Pacific Indemnity Company, duly authorized to transact a surety business, as surety, are held and firmly bound unto the United States of America in the full and just sum of two hundred and fifty dollars ($250), to be paid to the said United States of America; to which payment, well and truly to be made, we bind ourselves, our heirs, executors

and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of November, 1939.

Whereas said Lloyd N. Cobbledick, individually and as vice president of Cobbledick-Kibbe Glass Company, a corporation, and said Cobbledick-Kibbe Glass Company, a corporation, have this day appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the said District Court of the United States for the Northern District of California, Southern Division, made November 9, 1939, denying the motion of Lloyd N. Cobbledick, individually and as vice president of Cobbledick-Kibbe Glass Company, a corporation, and of said Cobbledick-Kibbe Glass Company, a corporation, to quash and vacate each paragraph and each lettered subdivision of each paragraph of that certain subpoena duces tecum directed to said Lloyd N. Cobbledick, Vice President, Cobbledick-Kibbe Glass Company, issued out of and under the seal of [39] said District Court of the United States under date of November 2, 1939, which said order was entered on or about November 9, 1939;

Now, Therefore, the condition of this obligation is such that if Lloyd N. Cobbledick, individually and as vice president of Cobbledick-Kibbe Glass Company, and said Cobbledick-Kibbe Glass Company shall answer all damages and costs if said

appeal is dismissed or said order is affirmed, or such costs as said Circuit Court of Appeals may award if said order is modified, then this obligation to be void, otherwise to remain in full force and virtue.

It is further expressly understood and agreed that, in case of breach of any condition of the above obligation, the court in the above entitled matter may, upon notice to the Pacific Indemnity Company of not less than ten (10) days, proceed summarily in said matter to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it, and award execution therefor.

[Seal] LLOYD N. COBBLEDICK

[Seal] LLOYD N. COBBLEDICK
Vice President of Cobbledick-Kibbe Glass Company

[Seal] COBBLEDICK-KIBBE GLASS COMPANY,
By L. N. COBBLEDICK
Vice President

[Seal] PACIFIC INDEMNITY COMPANY,
By R. R. POULTON
Attorney-in-Fact. [40]

State of California,
City and County of San Francisco—ss.

On this 9th day of November in the year one thousand nine hundred and thirty-nine, before me, Emily K. McCorry, a Notary Public in and for said

County and State, residing therein, duly commissioned and sworn, personally appeared R. R. Poulton, known to me to be the duly authorized Attorney-in-Fact of Pacific Indemnity Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said R. R. Poulton acknowledged to me that he subscribed the name of Pacific Indemnity Company, thereto as surety and his own name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] EMILY K. McCORRY

Notary Public in and for City and County of San Francisco, State of California.

My commission expires December 30, 1942. [40]

State of California,
City and County of San Francisco—ss.

On this 9th day of November, 1939, before me, Frank L. Owen, a notary public in and for said city and county and state, residing therein, duly commissioned and sworn, personally appeared Lloyd N. Cobbledick, known to me to be the person who subscribed to the foreging bond, individually and as vice president of Cobbledick-Kibbe Glass Company, and known to me to be vice president of Cobbledick-Kibbe Glass Company, the corporation described in and that executed the within instru-

ment, and also known to me to be the person who executed it for and on behalf of the corporation therein named, and he acknowledged to me that he executed the foregoing instrument individually and as vice president of Cobbledick-Kibbe Glass Company, and that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the city and county and state aforesaid the day and year in this certificate first above written.

[Seal] FRANK L. OWEN

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 10. 1939. [41]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the United States of America, and James V. Hayes and Morris R. Clark, special assistants to the Attorney General, its attorneys:

You are hereby advised that there has been this day filed in the above entitled matter notice of appeal and bond on appeal by Lloyd N. Cobbledick, individually and as Vice President of Cobbledick-Kibbe Glass Company, a corporation, and by said Cobbledick-Kibbe Glass Company, a corporation, from the order of the Honorable A. F. St. Sure, District Judge, made and entered in the above en-

titled matter on November 9, 1939, and that said appellants designate the entire record in said proceeding, including the following papers:

1. Petition for and order, filed with the clerk of said court on or about the ..... day of ....., 1939, directing the issuance of subpoena duces tecum, addressed to Lloyd N. Cobbledick, Vice President of Cobbledick-Kibbe Glass Company, 666 Howard Street, San Francisco, California;

2. Subpoena duces tecum issued on November 2, 1939, addressed to said Lloyd N. Cobbledick, Vice President of Cobbledick-Kibbe Glass Company, 666 Howard Street, San Francisco, California;

3. Return showing service of said subpoena duces tecum on said Lloyd N. Cobbledick, Vice President of Cobbledick-Kibbe Glass Company, 666 Howard Street, San Francisco, California;

4. Motion and notice of motion of said Lloyd N. Cobbledick, individually, and as Vice President of Cobbledick-Kibbe Glass Company, a corporation, and of said Cobbledick-Kibbe Glass Company, a corporation, to quash said subpoena duces tecum, said notice being dated November 7, 1939, together with the affidavit of Lloyd N. Cobbledick in support thereof, and copy of said subpoena duces tecum, and memoranda of points and authorities; [43]

5. Order shortening time for the service of said notice of motion to quash subpoena duces tecum, dated November 8, 1939;

6. Order of the above entitled court made by the Honorable A. F. St. Sure, Judge thereof, and

entered on or about November 9, 1939, denying said motion to quash;

7. Notice of appeal from said order denying said motion to quash, dated November 10, 1939, and filed November 10, 1939, together with bond on appeal in the sum of two hundred and fifty dollars ($250);

8. Order of the above entitled court made by the Honorable A. F. St. Sure, Judge thereof, and entered on November 10, 1939, denying a motion to stay the proceedings under said subpoena duces tecum pending the appeal;

9. Reporter's transcript of the proceedings at the hearing on November 10, 1939, at which the oral motion for a stay pending appeal was denied by the Honorable A. F. St. Sure, Judge of said District Court.

Dated: San Francisco, California, November 10, 1939.

CHALMERS G. GRAHAM
Robert Dollar Building,
San Francisco
FELIX T. SMITH
Standard Oil Building,
San Francisco
Attorneys for Lloyd N. Cobbledick, individually, and as Vice-President of Cobbledick-Kibbe Glass Company, and for Cobbledick-Kibbe Glass Company.

CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco
PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco
Of Counsel.

(Admission of Service)

[Endorsed]: Filed Nov. 10, 1939. [44]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 44 pages, numbered from 1 to 44, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of the motion of Lloyd N. Cobbledick, etc. et al to quash grand jury subpoena No. 2679, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $6.55 and that the said amount

has been paid to me by the Attorneys for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of November A. D. 1939.

[Seal] WALTER B. MALING
Clerk

J. P. WELSH
Deputy Clerk. [45]

[Endorsed]: No. 9364. United States Circuit Court of Appeals for the Ninth Circuit. Lloyd N. Cobbledick, individually, and as Vice-President of Cobbledick-Kibbe Glass Company, and Cobbledick-Kibbe Glass Company, a Corporation, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed November 13, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9364

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LLOYD N. COBBLEDICK, Individually, and as Vice President of Cobbledick-Kibbe Glass Company, and COBBLEDICK-KIBBE GLASS COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal From the District Court of the United States for the Northern District of California, Southern Division

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PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR STAY OF PROCEEDINGS ON SUBPOENA DUCES TECUM PENDING APPEAL AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF.

To the United States of America, and to Messrs. James V. Hayes, Esq., and Morris R. Clark, Esq., Special Assistants to the Attorney General, its attorneys:

You and each of you will please take notice that Lloyd N. Cobbledick, individually, and as Vice-President of Cobbledick-Kibbe Glass Company, a corporation, and Cobbledick-Kibbe Glass Company, a corporation, appellants in the above entitled matter, will, on Monday, the 13th day of November, 1939, at the hour of 10:00 A. M. of said day, or as soon thereafter as counsel can be heard, apply to the above entitled court at its courtroom in the Post-Office Building, in the City and County of San Francisco, State of California, for an order staying the operation of the subpoena duces tecum involved in said appeal pending the determination of said appeal or the further order of this court.

Said motion will be made upon the ground that such order is necessary in order to preserve the status quo pending said appeal.

Said motion will be based upon the records, papers and files in the above entitled matter and on the memorandum of points and authorities attached hereto.

Dated: November 13, 1939.

CHALMERS G. GRAHAM
FELIX T. SMITH
Attorneys for
Lloyd N. Cobbledick individually, and as Vice-President of Cobbledick-Kibbe Glass Company, a corporation, and for Cobbledick-Kibbe Glass Company, a corporation.

CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco

PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco
Of Counsel.

Memorandum of Points and Authorities

Rule 62 (g) of the Rules of Civil Procedure;

Janssen v. Belding-Corticelli (3d C. C. A.), 79 F. (2d) 828;

G. M. Foster, individually, et seq., et al., Appellants, v. United States of America, Appellee, No. 9287 (9th C. C. A.). Order dated September 20, 1939;

In re Cudahy Packing Co. of Chicago, Ill. (2d C. C. A.), 104 F. (2d) 658.

[Endorsed]: Filed Nov. 13, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, November 13, 1939.

Before: Denman, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

ORDER SUBMITTING MOTIONS AND CAUSES

Ordered motion of appellants for supersedeas pending appeals, motion of appellee to consolidate appeals, and oral motion of appellee to dismiss appeals, and causes on merits argued by Mr. Felix T. Smith, counsel for appellants, and by Mr. James V. Hayes, Special Assistant to the Attorney General, counsel for appellee, and submitted to the court for consideration and decision.

At a Stated Term, to wit: The October Term A. D. 1939, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the 27th day of November in the year of our Lord one thousand nine hundred and thirty-nine.

Present:

Honorable William Denman, Circuit Judge, Presiding,
Honorable Clifton Mathews, Circuit Judge,
Honorable William Healy, Circuit Judge.

No. 9362

EUGENE PALMUTH, Individually, etc., et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 9363

A. H. BRAWNER, Individually, etc., et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 9364

LLOYD N. COBBLEDICK, etc., et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

ORDER STAYING PROCEEDINGS ON SUBPOENAS DUCES TECUM.

Good cause therefor appearing, and by direction of the Court, It Is Ordered that the operation of the subpoena duces tecum involved in each of the appeals herein be, and each of said subpoenas duces tecum, hereby is stayed until the further order of this Court.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, November 28, 1939.

Before: Denman, Mathews and Healy,
Circuit Judges.

[Title of Causes.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENTS.

By direction of the Court, Ordered that the typewritten opinion this day rendered by this court in above causes be forthwith filed by the clerk, and that a judgment be filed in each of said causes and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Causes—Nos. 9362, 9363, 9364.]

Appeals from the District Court of the United States for the Northern District of California, Southern Division.

OPINION

Before Denman, Mathews and Healy, Circuit Judges:

Mathews, Circuit Judge:

These appeals are from orders denying motions to quash subpoenas duces tecum issued out of the District Court of the United States for the Northern District of California. The subpoenas were issued on November 2, 1939, and were directed to (1) Eugene Palmuth, president of Crowe Glass Company, (2) A. H. Brawner, officer and director of W. P. Fuller & Company, and (3) Lloyd N. Cobbledick, vice-president of Cobbledick-Kibbe Glass Company. Thereby each of the persons named was commanded to appear before the court on November 10, 1939, to testify and give evidence before the grand jury, and to bring with him certain letters, telegrams, correspondence, memoranda and other communications exchanged by or passing between the company of which he was an officer and one Sam Goodman.

On November 8, 1939, motions to quash the subpoenas were filed by Palmuth and Crowe Glass Company, Brawner and W. P. Fuller & Company,

and Cobbledick and Cobbledick-Kibbe Glass Company, respectively. The motions were denied and notices of appeal were filed on November 9, 1939.

In each of these cases, appellants' brief states: "The jurisdiction of this Court exists by virtue of section 225(a), title 28, of the United States Code Annotated."[1] Section 225(a) provides that the circuit courts of appeals shall have appellate jurisdiction to review by appeal "final decisions" in the district courts in all cases save where a direct review of the decision may be had in the Supreme Court under §345 of title 28.[2] The orders here appealed from are not "final decisions," within the meaning of §225(a), and are not appealable.

The contrary holding, In re Cudahy Packing Co., 2 Cir., 104 F. 2d 658, is clearly erroneous. That holding finds no support in Perlman v. United States, 247 U. S. 7, or in Go-Bart Importing Co. v. United States, 282 U. S. 344. No subpoena was involved in either of those cases. In each of them, the appeal was from an order denying an application for the return of papers belonging to the applicant and alleged to have been wrongfully seized or impounded, and to enjoin the use thereof as evidence. Such an order is, in effect, a judgment or decree dismissing a suit or proceeding for the recovery of property.

---

1. Judicial Code, §128(a), 52 Stat. 779.
2. Judicial Code, §238, 43 Stat. 938.

Between such an order and the orders here appealed from, there is no pertinent similarity. Appellants' papers have not been seized or impounded. Appellants have not brought or had occasion to bring any suit or proceeding to recover their papers. The denial of motions to quash the subpoenas was not a dismissal of any suit or proceeding. Appellants may, notwithstanding such denial, disregard the subpoenas and, if prosecuted for contempt, may again challenge their validity—thus, in effect, renewing the motions to quash—and, if convicted, may appeal. Upon such appeals, and not otherwise, the denial of the motions may be reviewed by this court.

Even where, after indictment and before trial, the defendant in a criminal case applies for an order requiring Government counsel to return papers taken from the defendant without a warrant, and for the suppression of evidence obtained therefrom, an order denying the application is not a final decision and, therefore, is not independently appealable, but is reviewable only upon appeal from a judgment of conviction. Cogen v. United States, 278 U. S. 221.

We have no reason to suppose that the Supreme Court would have ruled differently if, instead of a seizure of Cogen's papers, there had been a subpoena requiring him to produce them, and a motion by Cogen to quash the subpoena had been denied; or if, as in the cases at bar, such subpoena had been

issued in an inquisitorial proceeding before a grand jury. If an appeal were permissible in either case, the practical consequences with respect to the orderly administration of justice would be equally disastrous; and in determining whether these orders are final, in the sense in which that term is used in the governing statute, practical considerations, such as the existence of other available methods of review, and the delays attendant upon permitting direct appeals to be taken, should not be ignored.

Appeals dismissed.

[Endorsed]: Filed November 28, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9364

LLOYD N. COBBLEDICK, individually and as vice president of Cobbledick-Kibbe Glass Company, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and upon motion of appellants for supersedeas pending appeal, motion of appellee to consolidate appeals, and oral motion of appellee to dismiss appeal, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the appeal in this Cause be, and hereby is dismissed.

[Endorsed]: Filed and entered Nov. 28, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-six (66) pages, numbered from and including 1 to and including 66, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 30th day of November, A. D. 1939.

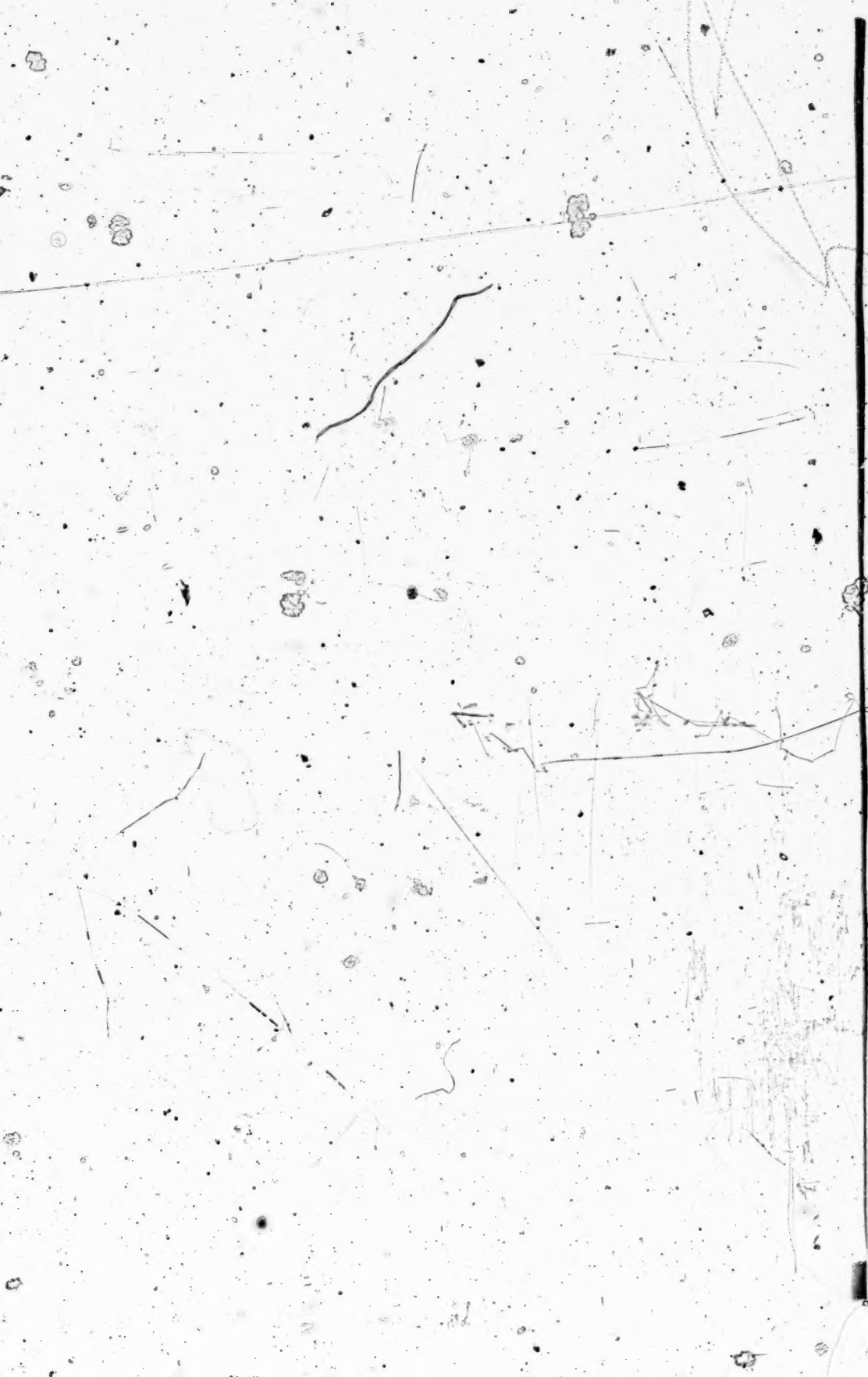
[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 18, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 572

A. H. BRAWNER, INDIVIDUALLY AND AS OFFICER AND DIRECTOR OF W. P. FULLER & CO., ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 6, 1939.

CERTIORARI GRANTED DECEMBER 18, 1939.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939

No. 572

A. H. BRAWNER, INDIVIDUALLY AND AS OFFICER AND DIRECTOR OF W. P. FULLER & CO., ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 12, 1940.

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NAMES AND ADDRESSES OF ATTORNEYS

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Standard Oil Bldg.,
San Francisco, Calif,

CHALMERS G. GRAHAM, Esq.,
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FRANK J. HENNESSY, Esq.,
U. S. Attorney, Northern District of California

MORRIS R. CLARK, Esq.,
JAMES V. HAYES, Esq.,
SAM E. NEEL, Esq.,
JOHN V. LEDDY, Esq.,
GEORGE FISHER, Esq.,
Special Assistants to the Attorney General.
Post Office Bldg.,
San Francisco, Calif.

In the District Court of the United States of America for the Northern District of California, Southern Division.

In the Examination of Matters Now Pending Before the Grand Jury in Session in the Northern District of California, Southern Division.

PETITION

Comes now Frank J. Hennessy, United States Attorney for the Northern District of California, and respectfully prays that an order be entered directing the Clerk of this Court to issue subpoenas duces tecum, returnable November 6, 1939, directed to:

(1) Lloyd N. Cobbledick, Vice President
Cobbledick-Kibbe Glass Company
666 Howard Street
San Francisco, California

(2) Eugene Palmuth, President
Crowe Glass Company
675 Golden Gate Avenue
San Francisco, California

(3) A. H. Brawner, Officer and Director
W. P. Fuller & Company
301 Mission Street
San Francisco, California

(4) A. E. Schwartz, Officer and Director
L. H. Butcher Company
15th and Vermont Streets
San Francisco, California

commanding said officers and directors to bring and produce on behalf of the United States at the

time aforesaid before the Grand Jury sitting in the United States Courts and Post Office Building, San Francisco, California, the books, records, and documents described in the list attached hereto and made a part hereof, as Exhibit A. [1*]

And, subpoenas duces tecum returnable November 10, 1939, directed to the officers and directors of the corporations aforesaid, commanding said officers and directors to bring and produce on behalf of the United States at the time aforesaid before the grand jury sitting in the United States Courts and Post Office Building, San Francisco, California, the books, records, and documents described in the list attached hereto and made a part hereof, as Exhibit B.

FRANK J. HENNESSY
United States Attorney for the Northern District of California.

Dated at San Francisco, California, this 2nd day of November, 1939.

(Here follows duces tecum portion of subpoena.)

[Endorsed]: Filed Nov. 2, 1939. [2]

[Title of District Court and Cause.]

ORDER

On Petition of Frank J. Hennessy, United States Attorney for the Northern District of California, for Subpoenas in the above-entitled matter,

*Page numbering appearing at foot of page of original certified Transcript of Record.

It is hereby ordered that subpoenas duces tecum returnable on November 6, 1939, directed to:

(1) Lloyd N. Cobbledick, Vice President
Cobbledick-Kibbe Glass Company
666 Howard Street
San Francisco, California

(2) Eugene Palmuth, President
Crowe Glass Company
675 Golden Gate Avenue
San Francisco, California

(3) A. H. Brawner, Officer and Director
W. P. Fuller & Company
301 Mission Street
San Francisco, California

(4) A. E. Schwartz, Officer and Director
L. H. Butcher Company
15th and Vermont Streets
San Francisco, California

commanding said officers and directors to bring and produce on behalf of the United States at the time aforesaid before the Grand Jury sitting in the United States Courts and Post Office Building, San Francisco, California, the books, records, and documents described in the list attached hereto and made a part hereof,* be issued, as prayed for in said Petition; and,

It is further ordered that subpoenas duces tecum, [3] returnable November 10, 1939, directed to the officers and directors to bring and produce on be-

*Exhibit A

half of the United States at the time aforesaid before the Grand Jury sitting in the United States Courts and Post Office Building, San Francisco, California, the books, records, and documents described in the list attached hereto and made a part hereof** be issued as prayed for in said Petition.

A. F. ST. SURE
United States District Judge.

Dated at San Francisco, California, this 2nd day of November, 1939.

(Here follows duces tecum portion of subpoena.)

[Endorsed]: Filed Nov. 2, 1939. [4]

[Title of District Court.]

SUBPOENA

The President of the United States of America

To A. H. Brawner, Officer and Director
W. P. Fuller & Company
301 Mission Street
San Francisco, California, Greeting:

You and each of you are hereby commanded, That all and singular business and excuses being laid aside, you and each of you, be and appear in your proper person before the United States District Court, for the Northern District of California, at the Court Room, in the City and County of San

**Exhibit B

Francisco, on the 10th day of November, A. D. 1939, at 10 o'clock in the forenoon, to Testify the Truth, and give evidence before the Grand Jury, and you are not to depart the Court without the leave of the Court or of the U. S. Attorney, and bring with you and produce at the time and place aforesaid:

All original letters, telegrams, correspondence, reports, memoranda, and other communications (or copies thereof where the originals are not in the possession of W. P. Fuller & Company) incoming or outgoing, exchanged by or passing, during the period from July 1, 1935 to date, between W. P. Fuller & Company, its officers, agents, or employees, and Sam Goodman, individually or as a representative of the Glass Jobbers' Association of San Francisco and Oakland, and relating to:

(a) The use, distribution, delivery, shipment, purchase, sale, or price of flat glass in the San Francisco Bay area.

(b) The importation of flat glass from foreign countries into the San Francisco Bay area, and the preparation of statistics in connection with such imports.

(c) The collection of statistics on the volume of business done by the larger persons, firms, and corporations engaged in the flat glass business in the San Francisco Bay area.

(d) The preparation and maintenance of a book or ledger containing a registry of flat glass jobs available in the San Francisco Bay area.

(e) Services performed by said Sam Goodman in checking prices bid on glass jobs by various bidders in the San Francisco Bay area.

(f) The protection of the price structure of the large flat glass dealers in the San Francisco Bay area from efforts on behalf of the smaller flat glass dealers in said area to purchase flat glass at prices less than those established by the large dealers.

(g) The negotiation of agreements covering wages, hours, and working conditions between the Glass Jobbers' Association of San Francisco and Oakland and labor unions.

(h) Meetings between said Sam Goodman, individually or as a representative of the Glass Jobbers' Association of San Francisco and Oakland, and a representative or representatives of W. P. Fuller & Company, at which any of the subjects set forth in paragraphs numbered (a), (b), (c), (d), (e), (f), and (g) above were described.

And this you are not to omit, under pain of being adjudged guilty of a contempt of said Court.

Witness, the Hon. A. F. St. Sure, Judge of the United States District Court for the Northern District of California, and the seal of the said Court, this 2nd day of November, in the year of our Lord, one thousand nine hundred and thirty-nine and of the Independence of the United States of America the one hundred and sixty-fourth.

[Seal] WALTER B. MALING,

Clerk.

By J. P. WELSH,

Deputy Clerk.

MARSHAL'S RETURN

I have served this writ personally by copy on A. H. Brawner, Officer and Director of W. P. Fuller & Company, at 301 Mission Street, San Francisco, Calif., this 3rd day of November, A. D. 1939.

GEORGE VICE,

U. S. Marshal.

By WARREN D. CAIN,

Deputy.

[Endorsed]: M. D. 46000 Crim. Received Nov. 2, 1939. U. S. Marshal's Office, San Francisco, Calif.

[Endorsed]: Filed Nov. 4, 1939.

In the District Court of the United States for the Northern District of California, Southern Division.

No. 2679

In the Matter of the Subpoena Returnable Before the Grand Jury Impaneled by the Honorable A. F. St. Sure, Judge of the above entitled Court, during the July term thereof, which Subpoena was issued out of and over the seal of said Court on November 2, 1939, directed to A. H. Brawner, Officer and Director W. P. Fuller & Company, 301 Mission Street, San Francisco, California.

ORDER SHORTENING TIME

Good cause being shown,

It is hereby ordered that service of the motion and notice [6] of motion to quash the subpoena duces tecum on file herein may be made by serving a copy of said motion and of this order upon Morris R. Clark, Esq., or upon any special assistant to the attorney general in his office, or upon the office of the United States Attorney for the Northern District of California, not later than 12 M. on the 8th day of November, 1939, at San Francisco, California, and the court hereby dispenses with other, further and different notice of the hearing of said motion.

It is further ordered that said motion shall be forthwith placed on the law and motion calendar

for hearing on Thursday, the 9th day of November, 1939, at the hour of 10 o'clock A. M., or as soon thereafter as counsel may be heard.

Dated: November 8, 1939.

A. F. ST. SURE,
United States District Judge.

(Admission of service.)

[Endorsed]: Filed Nov. 8, 1939. [7]

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION TO QUASH SUBPOENA DUCES TECUM. [8]

To the United States of America and to James V. Hayes, Esq., and Morris R. Clark, Esq., Special Assistants to the Attorney General of the United States, its attorneys:

Please take notice that on Thursday, November 9, 1939, at the hour of 10 o'clock A.M., or as soon thereafter as counsel can be heard, A. H. Brawner, individually and as officer and director of W. P. Fuller & Company, a California corporation, and W. P. Fuller & Company, a California corporation, will move the Honorable, the above entitled court in the courtroom of the Honorable A. F. St. Sure, Judge thereof, in the Post Office Building, San Francisco, California, for an order with reference to the above described subpoena (a copy of which

was handed to and left with said A. H. Brawner on or about November 3, 1939, and a copy of which is attached to the memorandum of points and authorities on file herein) as follows:

1. Quashing and vacating said subpoena;

2. Quashing and vacating the paragraph of said subpoena requiring the production of certain documents as purportedly described therein;

3. For such other and further relief as may be meet and proper in the premises.

Said motion will be made by the moving parties jointly and by each of them severally and will be made on the following grounds, severally and collectively:

1. Said subpoena duces tecum is oppressive, unreasonable and invalid because it does not call for documents but for information. The production of a document as purportedly called for by said subpoena would be tantamount to testimony that the document so produced passed between the parties described in said subpoena and related to the subjects enumerated therein; [9]

2. The enforcement of said subpoena for testimonial purposes would require the party on whom the subpoena was served to testify against himself, contrary to the Fifth Amendment;

3. Said subpoena cannot compel the witness to go through a file of papers to ascertain which ones "relate to" matters stated therein;

4. Said subpoena is oppressive, unreasonable and invalid because there is no showing by said subpoena, or otherwise, of the materiality or pertinence of the documents sought to be produced to any issue which the Federal Grand Jury has jurisdiction to consider;

5. Said subpoena is oppressive, unreasonable and invalid in that it asks for documents without regard to whether they relate to interstate or intrastate actions. Matters of intrastate commerce are beyond the jurisdiction of the Federal Grand Jury and beyond the reach of any subpoena issued in connection with its investigations;

6. Enforcement of said subpoena for testimonial purposes without any showing of the materiality or evidentiary value of the documents sought to be produced, and without any showing that they relate to matters within the jurisdiction of the Federal Grand Jury, would constitute an unlawful search and seizure contrary to the Fourth Amendment;

7. The enforcement of such subpoena would result in taking the property of the moving parties without compensation and without due process of law, contrary to the Fifth Amendment.

Said motion will be based on all records and files of this court relating to the Grand Jury investigation in connection with which said subpoena duces tecum was issued, on this motion and notice of motion, on the memorandum of points and authorities [10] filed herewith and the copy of said subpoena at-

tached thereto, on the affidavit of A. H. Brawner filed herein, and upon such oral testimony and other evidence as the court may permit to be offered at the hearing herein.

Dated: San Francisco, California, November 7, 1939.

CHALMERS G. GRAHAM,
FELIX T. SMITH,

Attorneys for A. H. Brawner, individually and as Officer and Director of W. P. Fuller & Company, and for W. P. Fuller & Company, a corporation.

CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco,
PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco,

(Admission of service.)

[Endorsed]: Filed Nov. 8, 1939. [11]

[Title of District Court and Cause.]

AFFIDAVIT OF A. H. BRAWNER IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM. [12]

State of California,
City and County of San Francisco—ss.

A. H. Brawner, being duly sworn, deposes and says that he is an officer and director of W. P. Fuller & Company, with offices located at 301 Mission Street, San Francisco, California; that he is familiar with the operation of the business of said company, but that many of the letters, telegrams, correspondence, reports, memoranda, and other communications called for by the subpoena duces tecum issued under the seal of this court on November 2, 1939, directed to affiant, and returnable November 10, 1939, are not matters of which affiant has personal knowledge; and that a large part of the letters, telegrams, correspondence, reports, memoranda and other communications contained in the files of said W. P. Fuller & Company are not identified in such a way that it can be ascertained from the face thereof whether or not they constitute letters, telegrams, correspondence, reports, memoranda or other communications passing between W. P. Fuller & Company, its officers, agents, or employees and Sam Goodman, or relating to the matters enumerated in said subpoena.

Dated: San Francisco, California, November 7, 1939.

A. H. BRAWNER.

Subscribed and sworn to before me this 7th day of November, 1939.

FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California.

(Admission of service.)

[Endorsed]: Filed Nov. 8, 1939. [13]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM. [14]

(1). The subpoena duces tecum in the instant case is oppressive, unreasonable and invalid, because it does not call for documents but for information. The production of a document as called for by the subpoena would be tantamount to testimony that the document so produced passed between the parties described in the subpoena and related to the subjects therein enumerated.

A subpoena duces tecum is mechanical—not testimonial—in operation. It commands production of specific documents rather than the exercise of discretion or judgment by the witness. The witness' duty is to examine the subpoena and produce the very paper therein described.

"The duty of a witness under the writ as regulated by statute is simply to bring a specified paper to a designated place. Under a writ ad testificandum a party cannot make a man his lawyer, or physician, or scientific instructor by subpoenaing him as an * * * expert. Under neither writ is he entitled to the judgment, discretion, opinion or professional service of the witness."

Elting v. United States, 27 Ct. Cl. 158, 165.

The subpoena in the instant case does not describe any document with particularity but is obviously an attempt to determine whether any correspondence did pass between the parties described therein and to determine whether any of such correspondence, if it exists, relates to any of the special subjects enumerated therein. Essentially, what the subpoena calls for is information as to the existence of certain correspondence and the existence of certain factual situations. In other words, it seeks facts rather than documents.

"* * * the subpoena duces tecum is not proper to be used for the purpose of obtaining facts or information * * * or general inquisitorial examination of books * * * with a view to ascertaining whether something of value may not show up * * *."

70 C. J. 51, sec. 37. [15]

See, for example, as an illustration of the violation of this principle by the present subpoena,

subparagraph (f) thereof, requiring the production of correspondence relating to the protection of the price structure of the large flat glass dealers in the San Francisco Bay area from efforts on behalf of the smaller flat glass dealers in said area to purchase flat glass at prices less than those established by the large dealers.

The Supreme Court of the United States, affirming refusal of a trial court to issue a subpoena duces tecum requiring the registrar of voters to furnish the number of white voters, of colored voters, and total number of voters who could sign their names, who had voted at the preceding congressional election, said:

> "The court was of opinion that either the defendant should have specified the books or documents required; or, *if he wished information* from the registrar, he should have subpoenaed him to attend and testify. We perceive no error in this action."
>
> Murray v. Louisiana, 163 U. S. 101, 107.

(2) Using the subpoena for testimonial purposes would require the party on whom the subpoena was served to testify against himself contrary to the Fifth Amendment.

There are, of course, authorities holding that a corporate officer cannot refuse to produce corporate records on the ground that they might tend to incriminate him personally. The situation contemplated by that rule is the production of documents

in response to a proper subpoena, in which the existence of the documents sought are known and the documents are described with particularity. The rule is not applicable to situations like the present one, in which the mere attempt to comply with the requirements of the subpoena would constitute testimony, that is, either [16] an affirmance or a denial of the existence of the documents sought and of their relevance to the particular subjects enumerated in the subpoena. The use of a subpoena for such testimonial purposes and in such a way that the party upon whom the subpoena was served has no opportunity to make claim of immunity constitutes in a very real sense the giving of testimony against himself in violation of his constitutional rights under the Fifth Amendment to the Constitution.

(3) A subpoena duces tecum cannot compel a witness to go through a file of papers to ascertain which ones "relate to" matters stated in the subpoena. Because this objection is very similar to the objection that a subpoena cannot be used for testimonial purposes, the case of Elting v. United States, 27 Ct. Cl. 158, 165, supra, is again pertinent. It was held therein that a party seeking documents or information by means of a subpoena duces tecum cannot compel the party on whom the subpoena is served

> "to go through a mass of papers and select those which in his [the witness's] judgment relate to the subject of litigation; *neither can he cast on the witness the responsibility of say-*

ing what papers do, and what papers do not, bear upon the issue to be tried" (italics ours).

In Rawlins v. Hall-Epps Clothing Co. (5th C.C.A., 1914), 217 Fed. 884, the court had before it orders for examination of the bankrupts and in disapproving of the scope of the orders, said (p. 887):

"They are required, by its terms, to determine at their peril what books of account and other writings and memoranda are material to the ascertainment of any of the matters mentioned in the order and to be covered in the examination.

We think this was requiring too much of the bankrupts. They should have been apprised by the order [17] itself what specific books, writings, and memoranda they were required to produce."

See also:

Mobile Gas Co. v. Patterson (D.C., Ala., 1923) 288 Fed. 884, 886.

(4) The subpoena duces tecum is objectionable because there is no showing by the subpoena, or otherwise, of the materiality or pertinence of the documents sought to be produced to any issue which the Federal Grand Jury has jurisdiction to consider.

As said by Mr. Justice Holmes, in Fed. Trade Comm. v. Amer. Tobacco Co. (1924), 264 U.S. 298,

a case involving an attempt to compel disclosure of records to the Federal Trade Commission in a Sherman Act proceeding (p. 306):

> "The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer. Wigram, Discovery, 2d. ed., sec. 293. We assume that the rule to be applied here is more liberal but still a ground must be laid and the ground and the demand must be reasonable." Essgee Co. v. United States, 262 U.S. 151, 156, 157. A general subpoena in the form of these petitions would be bad."

In Carpenter v. Winn (1911), 221 U.S. 533, a grand jury case, the court said, with reference to bills of discovery, that such a bill (p. 540):

> " * * * cannot be used merely for the purpose of enabling the plaintiff in such a bill to pry into the case of his adversary to learn its strength or weakness. A discovery sought upon suspicion, surmise or vague guesses is called a 'fishing bill,' and will be dismissed. * * * Such a bill must seek only evidence which is *material* to the support of the complainant's

own case, and prying into the nature of his adversary's case will not be tolerated" (italics ours). [18]

The same idea was expressed by Mr. Justice Cardozo, when on the Court of Appeals, in People v. Supreme Court (N.Y., 1927), 156 N.E. 84, wherein he said (p. 85):

"Documents are not subject to inspection for the mere reason that they will be useful in supplying a clew whereby evidence can be gathered. Documents to be subject to inspection must be *evidence* themselves" (citing cases) (italics ours).

See, generally:

Fed. Trade Comm. v. Amer. Tobacco Co. (1924), 264 U.S. 298, 305 (supra);

United States v. Terminal R. Ass'n. (C.C., Mo., 1907), 154 Fed. 268, collecting cases;

Third Nat. Bank & Trust Co. v. United States (6th C.C.A., 1931), 53 F. (2d) 599;

United States v. Aluminum Co. of America (D.C. N.Y., 1939), 26 F. Supp. 711.

(5) The subpoena duces tecum is oppressive, unreasonable and invalid in that it asks for documents without regard to whether they relate to interstate or intrastate transactions. Matters of intrastate commerce are beyond the jurisdiction of the Federal Grand Jury and beyond the scope of any subpoena issued in connection with its investigation.

In Fed. Trade Comm. v. Amer. Tobacco Co., 264 U.S. 298, supra, the court said (p. 307):

> "The demand was not only general but extended to the records and correspondence concerning business done wholly within the State. This is made a distinct ground of objection. We assume for present purposes that even some part of the presumably large mass of papers relating only to intrastate business may be so connected with charges of unfair competition in interstate matters as to be relevant, Stafford v. Wallace, 258 U.S. 495, 520, 521, but that possibility does not warrant a demand for the whole."

To the same effect, see Federal Trade Commission v. Smith (D.C., N.Y., 1929), 34 F. (2d) 323, 324. [19].

(6) Enforcement of subpoena duces tecum for testimonial purposes, without any showing of the materiality of the documents sought to be produced and without any showing that they relate to matters within the jurisdiction of the Federal Grand Jury, would constitute an unlawful search and seizure contrary to the Fourth Amendment.

A corporation may, of course, be compelled by *due and lawful process* to produce its books and papers; if the requirements, however, of a subpoena duces tecum requiring such production are not confined "*within limits which reason imposes in the circumstances of the case,*" it is not "due and lawful" in that the constitutional guaranty against unreasonable search is thereby violated.

The unlimited and unreasonable requirements of the process here involved have been hereinbefore pointed out. It specifies no particular paper but requires an indiscriminate search through the corporation's records, relevant or irrelevant, in the hope that something will turn up.

In a case cited with approval in Hale v. Henkel, 201 U.S. 43, the Supreme Court of Missouri said:

> "To permit an indiscriminate search among all the papers in one's possession for no particular paper, but some paper, which may throw some light on some issue involved in the trial of some cause pending, would lead to consequences that can be contemplated only with horror, and such a process is not to be tolerated among a free people. A grand jury has a general inquisitorial power. They may ask a witness * * * without reference to any particular offense which is the subject of inquiry, what he knows touching th violation of any section of the criminal code. Give such a body, in addition, the power to search any man's papers for evidence of some crime committed, and you convert it into a tribunal which would soon become as odious to American citizens as the Star Chamber was to Englishmen, or the Spanish Inquisition to the civilized world."

Ex Parte Brown, 72 Mo. 83, 94. [20]

See, also:

Fed. Trade Comm. v. Amer. Tobacco Co., 264 U.S. 298, 306;

Bank of America v. Douglas (D.C., App.), 105 F. (2d) 100, 106-107;

Go-Bart Co. v. United States, 282 U.S. 344, 356-357.

(7) Enforcement of said subpoena would result in the taking of property of the moving party without compensation and without due process of law, contrary to the Fifth Amendment.

Dated: San Francisco, California, November —, 1939.

Respectfully submitted,

CHALMERS G. GRAHAM,
FELIX T. SMITH,

Attorneys for A. H. Brawner, individually and as Officer and Director of W. P. Fuller & Company, and for W. P. Fuller & Company, a corporation.

CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco,
PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco,
Of Counsel.

(Here follows a copy of the subpoena duces tecum.)

(Admission of service.)

[Endorsed]: Filed Nov. 8, 1939. [21]

In the District Court of the United States of America for the Northern District of California, Southern Division.

No.

In the Matter of the Subpoena Returnable Before the Grand Jury Impaneled by the Honorable A. F. St. Sure, Judge of the above entitled Court, during the July term thereof, which Subpoena was issued out of and over the seal of said Court on November 2, 1939, directed to Lloyd N. Cobbledick, Vice President of Cobbledick-Kibbe Glass Company, 666 Howard Street, San Francisco, California.

No.

In the Matter of the Subpoena Returnable Before the Grand Jury Impaneled by the Honorable A. F. St. Sure, Judge of the above entitled Court, during the July term thereof, which Subpoena was issued out of and over the seal of said Court on November 2, 1939, directed to A. H. Brawner, Officer and Director, W. P. Fuller & Company, 301 Mission Street, San Francisco, California.

No.

In the Matter of the Subpoena Returnable Before the Grand Jury Impaneled by the Honorable A. F. St. Sure, Judge of the above entitled Court, during the July term thereof, which Subpoena was issued out of and over the seal

of said Court on November 2, 1939, directed to Eugene Palmuth, President Crowe Glass Company, 675 Golden Gate Avenue, San Francisco, California.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTIONS TO QUASH SUBPOENAS DUCES TECUM. [22]

SUMMARY OF POINTS AND AUTHORITIES

1. The Subpoena herein is reasonable and proper and is not unduly oppressive, and, in numerous instances, the Federal Courts have upheld Subpoenas Duces Tecum which were much broader in scope.

   Brown v. United States, 276 U. S. 134 (1928)

   Consolidated Rendering Company v. Vermont, 207 U. S. 541 (1908)

   Nelson v. United States, 201 U. S. 92 (1906)

   In re Investigation Conducted by the Attorney General, 27 Fed. Supp. 997 (D.C. S.D. N.Y., 1939)

   United States v. Medical Society, 26 Fed. Supp. 55 (D.C. D.C., 1938)

   In re The Petition of the Borden Company (an unreported opinion D.C. W.D. Ill., 1938)

   Norcross v. United States, 209 Fed. 13 (C. C. A. 9, 1913)

2. An officer of a corporation served with a Subpoena Duces Tecum to produce books and rec-

ords of the corporation cannot refuse to produce the records upon the grounds that the documents produced would tend to incriminate the corporation or himself.

Essgee Company v. United States, 262 U. S. 151 (1923)
Dreier v. United States, 221 U. S. 394 (1911)
Wilson v. United States, 221 U.S. 361 (1911)
Wheeler v. United States, 226 U. S. 478 (1913)
Grant and Burlingame v. United States, 227 U.S. 74 (1913)

3. The Subpoena Duces Tecum herein questioned does not constitute an unreasonable search and seizure in violation of the Fourth Amendment, nor deprivation of property without due process of law within the meaning of the Fifth Amendment.

Nelson v. United States, 201 U. S. 92 (1906)
Consolidated Rendering Company v. Vermont, 207 U. S. 541 (1908) [23]
Norcross v. United States, 209 Fed. 13, (C. C. A. 9, 1913)
In re Investigation Conducted by the Attorney General, 27 Fed. Supp. 997 (D.C. S.D. N.Y. 1939)
In re Petition of the Borden Company (an unreported opinion, D. C. N.D. Ill., 1938)
Essgee Company v. United States, 262 U. S. 151 (1923)

4. The use of the term "relating to" is sufficiently definite to enable the parties subpoenaed to determine what documents are called for. It is not necessary that each document, book, record, memorandum or paper be separately and individually described, provided that such subjects and subject matters are specifically enumerated and described and there is proper limitation as to the period of time which the documents called for are to cover.

   Brown v. United States, 276 U.S. 134 (1928)
   Nelson v. United States, 201 U.S. 92 (1906)
   Consolidated Rendering Company v. Vermont, 207 U.S. 541 (1908)
   Noreross v. United States, 209 Fed. 13 (C. C. A. 9, 1913)
   United States v. Medical Society, 26 Fed. Supp. 55 (D.C. D.C., 1938)
   In re Investigation Conducted by the Attorney General, 27 Fed. Supp. 997 (D.C. D.S. N.Y. 1939)
   In re Petition of the Borden Company (an unreported opinion D.C. W.D. Ill., 1938)

5. One Subpoenaed Duces Tecum in connection with a grand jury investigation under the anti-trust laws has no standing to challenge the grand jury's jurisdiction and cannot refuse to produce called-for documents on the grounds that some

of the transactions to which they relate are of an intrastate character.

Blair v. United States, 250 U.S. 273 (1919)
In re Medical Association, Chicago, Illinois, 26 Fed. Supp. 58, (D.C. D.C. 1938) [24]

6. Where Subpoenas Duces Tecum are issued to compel the production of documentary evidence before a grand jury, no showing as to relevancy and materiality of such evidence is required prior to the issuance of such subpoenas, or apart from the Duces Tecum clause therein contained. The materiality of evidence sought to be secured by Subpoenas Duces Tecum is a matter for determination not by those who may be subpoenaed, but the court in the light of the nature of the investigation, and with the widest latitude permitted to the Government.

Nelson v. United States, 201 U. S. 92 (1906)
Norcross v. United States, 209 Fed. 13 (C. C. A. 9, 1913)
In re Subpoenas Duces Tecum, 248 Fed. 137 (D.C. E.D. Tenn. S.D. 1916)
In re Black, 47 Fed. (2d) 542 (C.C.A. 2d, 1931)
Brown v. United States, 276 U. S. 134 (1928)
Blair v. United States, 250 U. S. 273 (1919)
Wilson v. United States, 221 U.S. 361 (1911)

7. Not a single case cited by movants in support of their motions to quash involved grand jury

investigations. Thus they are not authority in support of the present motions.

(a) The cases relied upon by movants and the type of proceedings involved therein are as follows:

Elting v. United States, 27 Ct. Cl. 158, 165 (Court of Claims)

Federal Trade Commission v. American Tobacco Company, 264 U. S. 298 (1924) (Federal Trade Commission)

Rawlins v. Hall Epp Clothing Company, 217 Fed. 884 (C.C.A. 5, 1914) (Bankruptcy)

Mobile Gas Company v. Patterson, 280 Fed. 884, 886 (D.C. Ala., 1923) (Bankruptcy)

Carpenter v. Winn, 221 U. S. 533 (1911) (Equity)

United States v. Terminal R. R. Association, 154 Fed. 268 (C.C. Mo., 1907) (Equity)

Third National Bank & Trust Company v. United States, 53 Fed. (2d) 599 (C.C.A. 6, 1931) (Equity) [25]

United States v. Aluminum Company of America, 26 F. Supp. 711 (D.C. S.D. N.Y. 1939) (Equity)

Federal Trade Commission v. Smith, 34 Fed. (2d) 323, 324 (D.C. N.Y. 1929) (Federal Trade Commission)

Go-Bart Company v. United States, 282 U.S. 344, 356-357 (1931) (Civil action for an injunction against use of evidence obtained on search warrant)

Bank of America v. Douglas, 105 Fed. (2d) 100, 106-107 (App. D.C. 1939) (Securities Exchange Commission)

Murray v. Louisiana, 163 U. S. 101, 107 (1890) (Action at law to Quash an Indictment)

People v. Supreme Court, 156 N. E. 84 (N.Y. 1927) (Action at law to compel production of evidence)

(b) The case of Carpenter v. Winn, 221 U. S. 533 (1911) which movants on page 5 of their memoranda of points and authorities in support of motions to quash expressly state was a grand jury case, did not involve a grand jury investigation. The nature of that case was set forth by the court in its opinion (p. 537):

> "The question is whether under Section 724 of the Revised Statutes, a court of law may compel one party to an action to produce, in advance of the trial, books and papers for examination and inspection by his adversary."

Respectfully submitted,

JAMES V. HAYES
MORRIS R. CLARK
JOHN V. LEDDY
SAM E. NEEL
ROBERT DILLER
GEORGE F. FISHER, JR.

Special Assistants to the Attorney General.

[Endorsed]: Filed Nov. 9, 1939. [26]

District Court of the United States, Northern District of California, Southern Division.

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 9th day of November, in the year of our Lord one thousand nine hundred and thirty-nine.

Present: the Honorable A. F. St. Sure, District Judge.

No. 2679

(Miscellaneous)

In the Matter of the Motions of Lloyd N. Cobbledick, Vice President of Cobbledick-Kibbe Glass Co., and Cobbledick-Kibbe Glass Co., A. H. Brawner, officer and director of W. P. Fuller & Co., and W. P. Fuller & Co., and Eugene Palmuth, President of Crowe Glass Co., and Crowe Glass Co., to quash Subpoenas Duces Tecum to appear before the United States Grand Jury, July 1939 term of this Court.

The motions of Lloyd N. Cobbledick, Vice President of Cobbledick-Kibbe Glass Co., and Cobbledick-Kibbe Glass Co., A. H. Brawner, Officer & Director of W. P. Fuller & Co., and W. P. Fuller & Co., and Eugene Palmuth, President of Crowe Glass Co., and Crowe Glass Co., to quash subpoenas duces tecum to appear before the United States Grand Jury, July 1939 term of this Court, came on regularly this day for hearing. Felix T. Smith,

Esq., and Chalmers G. Graham, Esq., appearing as attorneys for the moving parties, and James V. Hayes, Esq., and Morris R. Clark, Esq., Special Assistants to the Attorney General, appearing upon behalf of the United States.

The various motions were argued by Mr. Smith and Mr. Hayes and submitted to the Court for consideration and decision. Now, after due consideration had thereon, it is ordered that each of said motions to quash be and the same are hereby denied, and to which ruling the moving parties were allowed an exception.

Mr. Smith thereupon gave oral Notice of Appeal upon behalf of each of the moving parties. Mr. Smith moved the Court to grant a stay of execution herein. After hearing Mr. Smith and Mr. Hayes, it is ordered that each of the moving parties be allowed until November 13, 1939, within which time to prepare, serve and file their appeal papers.

[27]

In the Southern Division of the United States District Court, in and for the Northern District of California.

Before: HON. A. F. ST. SURE, Judge.

No. 2679—Misc.

In the Matter of the Petitions of LLOYD N. COBBLEDICK, Vice-President of Cobbledick-Kibbe Glass Company, A. H. BRAWNER, Vice-President and Director W. P. Fuller & Co., and EUGENE PALMUTH, President Crowe Glass Company, to Quash Subpoenaes Duces Tecum to Appear Before U. S. Grand Jury July, 1939 Term of this Court.

TESTIMONY

Friday, November 10, 1939.

Counsel Appearing:

For the United States: James V. Hayes, Esq. and Morris R. Clark, Esq., Special Assistants to the Attorney General of the United States.

For the Petitioners: Felix T. Smith, Esq., Chalmers G. Graham, Esq., Henry G. Hayes, Esq.

Mr. Henry G. Hayes: As your Honor knows, yesterday the motions to quash subpoenaes duces tecum before the Grand Jury were argued and were denied.

The Court: Yes.

Mr. Henry G. Hayes: At that time Mr. Smith gave notice of appeal, and asked for a stay, and your Honor was uncertain as to whether your Honor had jurisdiction to enlarge the time for appearance before the Grand Jury. As you know, Mr. Felix Smith wrote you a letter, of which a copy has been handed to counsel for the Government, submitting authorities——

The Court: I haven't seen the letter. It is probably on my desk. [28]

Mr. James V. Hayes: Here is a copy supplied to the Government, your Honor.

The Court: In the letter Mr. Smith says he admits the Court has the power to make an appropriate order to preserve the status quo. What do you wish to say about it? The only question is whether or not the Court will make the order.

Mr. Henry G. Hayes: Well, it is a matter for the Court, your Honor, but our feeling is that an appearance by the witnesses to-day would, in reality, be an appearance pending the appeal.

The Court: I don't know whether I would want to make any order at all. It would depend on what the Government thinks about the matter. In other words, if the Government is prepared to go ahead with the witnesses, the Grand Jury is in session, and I might conclude the hearing should go ahead.

Mr. Henry G. Hayes: Despite the pendency of the appeal, your Honor? I would say that makes the appeal valueless.

The Court: I don't think there is anything in the point that Mr. Smith makes at this time.

Mr. Henry G. Hayes: Well, we, of course, feel, first, your Honor, that if we ask——

The Court: I understand. I believe you are acting in good faith in the matter.

Mr. Henry G. Hayes: I might suggest, your Honor, as Mr. Smith did in his letter, I believe, that in the Grand Jury case down South an enlargement of time in the District Court was obtained by stipulation of counsel, and when the case got up into the Circuit Court of Appeals the time was enlarged in the Circuit Court. [29]

The Court: I don't know how the Government feels about the matter. Do you want to continue with the proceedings?

Mr. James V. Hayes: Yes, your Honor. The Grand Jury is presently waiting for us to appear before it.

The Court: Well, you have looked into the case, have you?

Mr. James V. Hayes: Yes, we have, your Honor. The law, as we see it, first of all the cases cited by counsel do not have anything to do with any duty on the Court——

The Court: No, I think the Court——

Mr. James V. Hayes: We don't believe there is any question in regard to the Court's power to control the Grand Jury.

The Court: I think I could do that. The only thought I had was whether or not I wanted to continue the matter, hold up further proceedings before the Grand Jury, whether or not I would have the power to do that.

Mr. Henry G. Hayes: Your Honor, as I recall, counsel will check me, I think, that you made a suggestion yesterday of continuing the matter until Monday if you felt you had the jurisdiction to do that.

The Court: Well, I did not—all I said to Mr. Smith was to take his appeal, and he promised me he would do that.

Mr. Henry G. Hayes: Yes; that was filed this morning, your Honor.

The Court: And that has been attended to. I can't see any good reason to hold up the proceedings of the Grand Jury.

(After discussion a recess was taken until 11:30 A. M.)

The Court: Well, gentlemen, is there anything further you wish to say to the Court about this matter?

Mr. Felix Smith: Well, your Honor, our position is that we [30] have a serious question, and a very difficult question. As a matter of fact, if your Honor should order these witnesses to produce these documents I would have the gravest difficulty, myself, in

telling them what they ought to produce, in that it is impossible to tell from this subpoena what the duties of the witness are. We think that is a serious matter, and we should be allowed to present it to the Circuit Court of Appeals. I realize your Honor does not sympathize with our view, but I think we should be permitted to present that matter to the Court in the regular way.

Now, if your Honor does not wish to make a stay, of course, that is within your Honor's discretion, but I think your Honor ought to permit us to make an application to the Circuit Court of Appeals for a stay.

The Court: Well, how much time do your want for that?

Mr. Smith: Well, I believe that will have to rest within the judgment of the Circuit Court of Appeals. I can go into the Circuit Court of Appeals and try to see the Presiding Justice this morning. I don't know whether he is even in town. I could confer with him this morning. I think he should have very definite ideas about when the Court could hear a motion of that kind.

The Court: It would seem now that it would be a mistake for this Court to hold up the proceedings of the Grand Jury until your appeal is decided.

Mr. Smith: I realize that is the attitude your Honor has. As I say, I would want to expedite the appeal, but I think that, holding your Honor's view, your Honor still would feel that it was the proper

thing to allow sufficient time to make an application to the Circuit Court of Appeals.

The Court: Yes. I am wondering how much time would be [31] necessary for you to do that. It is almost twelve o'clock now, twenty-five minutes to twelve.

Mr. Smith: Yes.

The Court: Tomorrow is a legal holiday, it is a national holiday, and then comes Sunday. I wonder how long——

Mr. Smith: It might be the Circuit Court of Appeals in an application of this kind would hear it Monday morning. I assume that counsel for the United States would co-operate with us in having a matter of that kind taken up promptly?

The Court: Yes. Perhaps it would be well if the United States Attorney and you and myself go and see the Senior Circuit Judge of the Court of Appeals.

Mr. Smith: I hate to impose upon your Honor that way, but that would, I think——

The Court: Oh, no, no.

Mr. Smith (Continuing) —be the most expeditious way of attending to the matter.

The Court: We may impress upon the Court the necessity of hearing the matter at an early date. Do you see any objection to that?

Mr. James V. Hayes: I see no objection to it, your Honor, if such an application should be made to the Circuit Court of Appeals to-day, but I would

freely consent to an adjournment of the subpoenaes if I believed there was any merit in the argument advanced. Convinced, as I am, that there is no merit in it, and with the Grand Jury actually sitting, waiting for the witnesses, and seeking to conclude its investigation, and feeling that this is an effort to secure further delay, I don't feel I can, in conformance with my duty in the circumstances, make any consent which would require a longer delay than certainly Monday.

The Court: Well, I wouldn't ask any consent. I wouldn't ask [32] you to consent, but I am wondering what the best thing to do under the circumstances would be. We can see Judge Wilbur at this time and ask him if he can take it up on Monday.

Mr. Smith: Shall I see if he is there, your Honor?

The Court: I say, we can go and see him.

Mr. Smith: I see, your Honor.

(After recess:)

The Court: Since we conferred with Judge Wilbur I take it, gentlemen, that there will be no objection to the Court's adjourning the subpoenaes before the Grand Jury until next Wednesday morning at ten o'clock.

Mr. James V. Hayes: That is correct, your Honor.

The Court: Is there anything further you wish to say?

Mr. James V. Hayes: Except this, that that agreement by the Government was on the condition that counsel submit a brief and record to the Circuit

Court on Monday and ask for a hearing on the merits. The Government will have its brief ready at the same time.

The Court: Mr. Smith, you desire a hearing at the earliest time, do you not?

Mr. Smith: Yes, your Honor. It will have to be a typewritten brief and transcript.

The Court: Yes. I think there will be no question about the Court permitting you to proceed that way, in so far as the record is concerned.

Mr. Smith: Your Honor, I will have a typewritten transcript and brief ready Monday.

Mr. James V. Hayes: The Government will be ready with its brief on Monday.

Mr. Smith: May I suggest the record in the Circuit Court of Appeals will be better if the Court makes an order denying [33] my motion to stay the proceedings under the three subpoenaes duces tecum and continue the return date on the subpoenaes until Wednesday morning.

The Court: Motion is denied and an exception noted. [34]

CERTIFICATE OF OFFICIAL PHONOGRAPHIC REPORTER

State of California,
City and County of San Francisco—ss.

I, Kenneth G. Gagan, hereby certify that I am an official shorthand reporter of the United States District Court for the Northern District of California,

and that as such reporter I took down in shorthand writing on the 10th day of November, 1939, the proceedings had in the matter entitled in the caption hereof, fully, truly and correctly, to the best of my ability; that I thereafter caused my said shorthand writing to be transcribed into typewriting, and that the foregoing 7 pages constitute said transcript; that the same is a full, true and correct transcription of my said shorthand notes aforesaid, and is a full, true, accurate and correct transcription of said proceedings in said matter.

Dated, San Francisco, Calif., November 10, 1939.

KENNETH G. GAGAN,
Official Shorthand Reporter.

[Endorsed]: Filed Nov. 10, 1939. [35]

[Title of District Court.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 10th day of November, in the year of our Lord one thousand nine hundred and thirty-nine.

Present: the Honorable A. F. St. Sure,
District Judge.

[Title of Cause.]

In this matter Felix T. Smith, Esq., Attorney for the moving parties herein, moved the Court to stay proceedings on Subpoenas Duces Tecum issued to—

Lloyd N. Cobbledick, Vice President of Cobbledick-Kibbe Glass Co.,
A. H. Brawner, Officer & Director of W. P. Fuller & Co., and
Eugene Palmuth, President of Crowe Glass Co.,

requiring them, and each of them, to appear before the United States Grand Jury, July 1939 Term of this Court.

After hearing Mr. Smith and James V. Hayes, Esq., Special Assistant to the Attorney General, in opposition thereto, It Is Ordered that said motion be and the same is hereby Denied. The moving parties were allowed an exception to the ruling of the Court.

Further ordered that the return day of each subpoena be extended until Wednesday, November 15, 1939, at 10 o'clock a. m. [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL [37]

Notice is hereby given that A. H. Brawner, individually, A. H. Brawner, Officer and Director, W. P. Fuller & Co., a California corporation, and W. P. Fuller & Co., a California corporation, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the District Court of the United States for the Northern District of California, Southern Division, made Novem-

ber 9, 1939, denying the motion of A. H. Brawner, individually, and as Officer and Director of W. P. Fuller & Co., a California corporation, and of said W. P. Fuller & Co., a California corporation, to quash and vacate each paragraph and each lettered subdivision of each paragraph of that certain subpoena duces tecum directed to said A. H. Brawner, Officer and Director, W. P. Fuller & Company, issued out of and under the seal of said District Court of the United States under date of November 2, 1939, which said order was entered on or about November 9, 1939.

Dated: San Francisco, California, November 9, 1939.

CHALMERS G. GRAHAM
Robert Dollar Building,
San Francisco, California.
Telephone: Garfield 8700.
FELIX T. SMITH
Standard Oil Building,
San Francisco, California.
Telephone: Garfield 6133.
Attorneys for A. H. Brawner, individually, A. H. Brawner, Officer and Director of W. P. Fuller & Co., and W. P. Fuller & Co.

PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco, California.
CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco.
Of Counsel.

[Endorsed]: Filed Nov. 10, 1939. [38]

BOND

Know All Men By These Presents:

That we, A. H. Brawner, individually, and as officer and director of W. P. Fuller & Co., a corporation organized and existing under and by virtue of the laws of the State of California, having an office and place of business at 301 Mission Street, City and County of San Francisco, California, and said W. P. Fuller & Co., a corporation, as aforesaid, as principals, and Pacific Indemnity Company, duly authorized to transact a surety business, as surety, are held and firmly bound unto the United States of America in the full and just sum of two hundred and fifty dollars ($250), to be paid to the said United States of America; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 9th day of November, 1939.

Whereas said A. H. Brawner, individually, and as officer and director of W. P. Fuller & Co., a corporation, and said W. P. Fuller & Co., a corporation, have this day appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of said District Court of the United States for the Northern District of California, Southern Division, made November 9, 1939, denying the motion of A. H. Brawner, individually, and as officer and director of W. P. Fuller & Co., a corporation, and of said W. P. Fuller & Co., a corporation, to quash and vacate each paragraph and each lettered subdivision of each paragraph of that certain subpoena duces tecum directed to said A. H. Brawner, officer and director, W. P. Fuller & Company, issued out of and under the seal of said District Court of the United States, under date of November [39] 2, 1939, which said order was entered on or about November 9, 1939;

Now the condition of the above obligation is such that if A. H. Brawner, individually, and as officer and director of said W. P. Fuller & Co., and said W. P. Fuller & Co., shall pay all damages and costs, if said appeal is dismissed, or said order is affirmed, or such cost as said Circuit Court of Appeals may award if said order is modified, then this obligation to be void; else to remain in full force and virtue.

It is further expressly understood and agreed that in case of a breach of any condition of the above obligation, the court in the above entitled matter may, upon notice to the Pacific Indemnity Company, of not less than ten (10) days, proceed summarily in said matter to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it, and award execution therefor.

[Seal] A. H. BRAWNER,
A. H. Brawner, individually

[Seal] A. H. BRAWNER,
A. H. Brawner, Officer and Director, W. P. Fuller & Co., a corporation

[Seal] W. P. FULLER & CO.,
By A. H. BRAWNER,
Treasurer

[Seal] PACIFIC INDEMNITY COMPANY,
By R. R. POULTON,
Attorney in fact [40]

State of California,
City and County of San Francisco—ss.

On this 9th day of November in the year one thousand nine hundred and thirty-nine, before me, Emily K. McCorry, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared R. R. Poul-

ton, known to me to be the duly authorized Attorney-in-Fact of Pacific Indemnity Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said R. R. Poulton acknowledged to me that he subscribed the name of Pacific Indemnity Company, thereto as surety and his own name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] EMILY K. McCORRY
Notary Public in and for City and County of San Francisco, State of California.

My commission expires December 30, 1942. [40]

State of California,
City and County of San Francisco—ss.

On this 9th day of November, 1939, before me, Frank L. Owen, a notary public in and for said city and county and state, residing therein, duly commissioned and sworn, personally appeared A. H. Brawner, known to me to be the person who subscribed to the foregoing bond, individually and as officer and director of W. P. Fuller & Co., and known to me to be an officer and director of W. P. Fuller & Co., and known to me to be the treasurer of W. P. Fuller & Co., the corporation described in and that executed the within instrument, and also known to me to be the person who executed it for

and on behalf of the corporation therein named, and he acknowledged to me that he executed the foregoing instrument individually and as officer and director of W. P. Fuller & Co., and that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the city and county and state aforesaid the day and year in this certificate first above written.

[Seal] FRANK L. OWEN
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 10, 1939. [41]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the United States of America, and James V. Hayes and Morris R. Clark, special assistants to the Attorney General, its attorneys:

You are hereby advised that there has been this day filed in the above entitled matter notice of appeal and bond on appeal by A. H. Brawner, individually, and as officer and director of W. P. Fuller & Co., a corporation, and by said W. P. Fuller & Co., a corporation, from the order of the Honorable A. F. St. Sure, District Judge, made and entered in the above entitled matter on November 9, 1939,

and that said appellants designate the entire record in said proceeding, including the following papers:

1. Petition for and order filed with the clerk of said court on or about the ..... day of ....., 1939, directing the issuance of subpoena duces tecum, addressed to A. H. Brawner, officer and director, W. P. Fuller & Co. 301 Mission Street, San Francisco, California;

2. Subpoena duces tecum issued on November 2, 1939, addressed to said A. H. Brawner, officer and director, W. P. Fuller & Co., 301 Mission Street, San Francisco, California;

3. Return showing service of said subpoena duces tecum on said A. H. Brawner, officer and director, W. P. Fuller & Co., 301 Mission Street, San Francisco, California;

4. Motion and notice of motion of said A. H. Brawner, individually, and as officer and director of W. P. Fuller & Co., a corporation, and of said W. P. Fuller & Co., a corporation, to quash said subpoena duces tecum, said notice being dated November 7, 1939, together with the affidavit of A. H. Brawner in support thereof, and copy of said subpoena duces tecum; and memoranda of points and authorities;

5. Order shortening time for the service of said notice of motion to quash subpoena duces tecum, dated November 8, 1939;

6. Order of the above entitled court made by the Honorable A. F. St. Sure, Judge thereof, and

entered on or about November 9, 1939, denying said motion to quash; [43]

7. Notice of appeal from said order denying said motion to quash, dated November 10, 1939, and filed November 10, 1939, together with bond on appeal in the sum of two hundred and fifty dollars ($250);

8. Order of the above entitled court, made by the Honorable A. F. St. Sure, Judge thereof, and entered on November 10, 1939, denying a motion to stay the proceedings under said subpoena duces tecum pending the appeal;

9. Reporter's transcript of the proceedings at the hearing on November 10, 1939, at which the oral motion for a stay pending appeal was denied by the Honorable A. F. St. Sure, Judge of said District Court.

Dated: San Francisco, California, November 10, 1939.

CHALMERS G. GRAHAM
Robert Dollar Building,
San Francisco
FELIX T. SMITH
Standard Oil Building,
San Francisco
Attorneys for A. H. Brawner, individually, and as Officer and Director of W. P. Fuller & Co., and for W. P. Fuller & Co.

CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco
PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco
Of Counsel.

(Admission of Service)

[Endorsed]: Filed Nov. 10, 1939. [44]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 44 pages, numbered from 1 to 44, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of the motion of A. H. Brawner, etc. et al to quash grand jury subpoena No. 2679, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $6.55 and that the said amount

has been paid to me by the Attorneys for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of November A. D. 1939.

[Seal] WALTER B. MALING
Clerk

J. P. WELSH
Deputy Clerk. [45]

[Endorsed]: No. 9363. United States Circuit Court of Appeals for the Ninth Circuit. A. H. Brawner, Individually and as Officer and Director of W. P. Fuller & Co., and W. P. Fuller & Co., a Corporation, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed November 13, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9363

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

A. H. BRAWNER, Individually and as Officer and Director of W. P. Fuller & Co., and W. P. FULLER & CO., a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal From the District Court of the United States for the Northern District of California, Southern Division

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR STAY OF PROCEEDINGS ON SUBPOENA DUCES TECUM PENDING APPEAL AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF.

To the United States of America, and to Messrs. James V. Hayes, Esq., and Morris R. Clark, Esq., Special Assistants to the Attorney General, its attorneys:

You and each of you will please take notice that A. H. Brawner, individually and as officer and director of W. P. Fuller & Co., a corporation, and W. P. Fuller & Co., a corporation, appellants in the above entitled matter, will, on Monday, the 13th day of November, 1939, at the hour of 10:00 A. M. of said day, or as soon thereafter as counsel can be heard, apply to the above entitled court at its courtroom in the Post-Office Building, in the City and County of San Francisco, State of California, for an order staying the operation of the subpoena duces tecum involved in said appeal pending the determination of said appeal or the further order of this court.

Said motion will be made upon the ground that such order is necessary in order to preserve the status quo pending said appeal.

Said motion will be based upon the records, papers and files in the above entitled matter and on the memorandum of points and authorities attached hereto.

Dated: November 13, 1939.

CHALMERS G. GRAHAM
FELIX T. SMITH
Attorneys for A. H. Brawner, individually and as officer and director of W. P. Fuller & Co., a corporation, and for W. P. Fuller & Co., a corporation.

CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco

PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco
Of Counsel.

Memorandum of Points and Authorities

Rule 62 (g) of the Rules of Civil Procedure;

Janssen v. Belding-Corticelli (3d C. C. A.), 79 F. (2d) 828;

G. M. Foster, individually, et seq., et al. Appellants, v. United States of America, Appellee, No. 9287 (9th C. C. A.). Order dated September 20, 1939;

In re Cudahy Packing Co. of Chicago, Ill. (2d C. C. A.), 104 F. (2d) 658.

[Endorsed]: Filed Nov. 13, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, November 13, 1939.

Before: Denman, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

ORDER SUBMITTING MOTIONS AND CAUSES

Ordered motion of appellants for supersedeas pending appeals, motion of appellee to consolidate appeals, and oral motion of appellee to dismiss appeals, and causes on merits argued by Mr. Felix T. Smith, counsel for appellants, and by Mr. James V. Hayes, Special Assistant to the Attorney General, counsel for appellee, and submitted to the court for consideration and decision.

At a Stated Term, to wit: The October Term A. D. 1939, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the 27th day of November in the year of our Lord one thousand nine hundred and thirty-nine.

Present:

Honorable William Denman, Circuit Judge, Presiding,
Honorable Clifton Mathews, Circuit Judge,
Honorable William Healy, Circuit Judge.

No. 9362

EUGENE PALMUTH, Individually, etc., et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 9363

A. H. BRAWNER, Individually, etc., et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 9364

LLOYD N. COBBLEDICK, etc., et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

ORDER STAYING PROCEEDINGS ON SUBPOENAS DUCES TECUM.

Good cause therefor appearing, and by direction of the Court, It Is Ordered that the operation of the subpoena duces tecum involved in each of the appeals herein be, and each of said subpoenas duces tecum, hereby is stayed until the further order of this Court.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, November 28, 1939.

Before: Denman, Mathews and Healy,
Circuit Judges.

[Title of Causes.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENTS.

By direction of the Court, Ordered that the typewritten opinion this day rendered by this court in above causes be forthwith filed by the clerk, and that a judgment be filed in each of said causes and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Causes—Nos. 9362, 9363, 9364.]

Appeals from the District Court of the United States for the Northern District of California, Southern Division.

OPINION

Before Denman, Mathews and Healy, Circuit Judges:

Mathews, Circuit Judge:

These appeals are from orders denying motions to quash subpoenas duces tecum issued out of the District Court of the United States for the Northern District of California. The subpoenas were issued on November 2, 1939, and were directed to (1) Eugene Palmuth, president of Crowe Glass Company, (2) A. H. Brawner, officer and director of W. P. Fuller & Company, and (3) Lloyd N. Cobbledick, vice-president of Cobbledick-Kibbe Glass Company. Thereby each of the persons named was commanded to appear before the court on November 10, 1939, to testify and give evidence before the grand jury, and to bring with him certain letters, telegrams, correspondence, memoranda and other communications exchanged by or passing between the company of which he was an officer and one Sam Goodman.

On November 8, 1939, motions to quash the subpoenas were filed by Palmuth and Crowe Glass Company, Brawner and W. P. Fuller & Company,

and Cobbledick and Cobbledick-Kibbe Glass Company, respectively. The motions were denied and notices of appeal were filed on November 9, 1939.

In each of these cases, appellants' brief states: "The jurisdiction of this Court exists by virtue of section 225(a), title 28, of the United States Code Annotated." Section 225(a) provides that the circuit courts of appeals shall have appellate jurisdiction to review by appeal "final decisions" in the district courts in all cases save where a direct review of the decision may be had in the Supreme Court under §345 of title 28.[2] The orders here appealed from are not "final decisions," within the meaning of §225(a), and are not appealable.

The contrary holding, In re Cudahy Packing Co., 2 Cir., 104 F. 2d 658, is clearly erroneous. That holding finds no support in Perlman v. United States, 247 U. S. 7, or in Go-Bart Importing Co. v. United States, 282 U. S. 344. No subpoena was involved in either of those cases. In each of them, the appeal was from an order denying an application for the return of papers belonging to the applicant and alleged to have been wrongfully seized or impounded, and to enjoin the use thereof as evidence. Such an order is, in effect, a judgment or decree dismissing a suit or proceeding for the recovery of property.

---

1. Judicial Code, §128(a), 52 Stat. 779.
2. Judicial Code, §238, 43 Stat. 938.

Between such an order and the orders here appealed from, there is no pertinent similarity. Appellants' papers have not been seized or impounded. Appellants have not brought or had occasion to bring any suit or proceeding to recover their papers. The denial of motions to quash the subpoenas was not a dismissal of any suit or proceeding. Appellants may, notwithstanding such denial, disregard the subpoenas and, if prosecuted for contempt, may again challenge their validity—thus, in effect, renewing the motions to quash—and, if convicted, may appeal. Upon such appeals, and not otherwise, the denial of the motions may be reviewed by this court.

Even where, after indictment and before trial, the defendant in a criminal case applies for an order requiring Government counsel to return papers taken from the defendant without a warrant, and for the suppression of evidence obtained therefrom, an order denying the application is not a final decision and, therefore, is not independently appealable, but is reviewable only upon appeal from a judgment of conviction. Cogen v. United States, 278 U. S. 221.

We have no reason to suppose that the Supreme Court would have ruled differently if, instead of a seizure of Cogen's papers, there had been a subpoena requiring him to produce them, and a motion by Cogen to quash the subpoena had been denied: or if, as in the cases at bar, such subpoena had been

issued in an inquisitorial proceeding before a grand jury. If an appeal were permissible in either case, the practical consequences with respect to the orderly administration of justice would be equally disastrous; and in determining whether these orders are final, in the sense in which that term is used in the governing statute, practical considerations, such as the existence of other available methods of review, and the delays attendant upon permitting direct appeals to be taken, should not be ignored.

Appeals dismissed.

[Endorsed]: Filed November 28, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9363.

A. H. BRAWNER, individually and as officer and director of W. P. Fuller & Co., a corporation, and W. P. FULLER & CO., a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and upon motion of appellants for supersedeas pending appeal, motion of appellee to consolidate appeals, and oral motion of appellee to dismiss appeal, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the appeal in this Cause be, and hereby is dismissed.

[Endorsed]: Filed and entered Nov. 28, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-six (66) pages, numbered from and including 1 to and including 66, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 30th day of November, A. D. 1939.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 18, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 573

EUGENE PALMUTH, INDIVIDUALLY AND AS PRESIDENT OF CROWE GLASS COMPANY ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 6, 1939.

CERTIORARI GRANTED DECEMBER 18, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 573

EUGENE PALMUTH, INDIVIDUALLY AND AS PRESIDENT OF CROWE GLASS COMPANY ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 12, 1940.

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NAMES AND ADDRESSES OF ATTORNEYS

PILLSBURY, MADISON & SUTRO, Esqrs.,
FELIX T. SMITH, Esq.,
Standard Oil Bldg.,
San Francisco, Calif.

CHALMERS G. GRAHAM, Esq.,
Robert Dollar Bldg.,
San Francisco, Calif.
Attorneys for Appellants.

FRANK J. HENNESSY, Esq.,
U. S. Attorney, Northern District of California

MORRIS R. CLARK, Esq.,
JAMES V. HAYES, Esq.,
SAM E. NEEL, Esq.,
JOHN V. LEDDY, Esq.,
GEORGE FISHER, Esq.,
Special Assistants to the Attorney General.
Post Office Bldg.,
San Francisco, Calif.

In the District Court of the United States of America for the Northern District of California, Southern Division.

In the Examination of Matters Now Pending Before the Grand Jury in Session in the Northern District of California, Southern Division.

PETITION

Comes now Frank J. Hennessy, United States Attorney for the Northern District of California, and respectfully prays that an order be entered directing the Clerk of this Court to issue subpoenas duces tecum, returnable November 6, 1939, directed to:

(1) Lloyd N. Cobbledick, Vice President
Cobbledick-Kibbe Glass Company
666 Howard Street
San Francisco, California

(2) Eugene Palmuth, President
Crowe Glass Company
675 Golden Gate Avenue
San Francisco, California

(3) A. H. Brawner, Officer and Director
W. P. Fuller & Company
301 Mission Street
San Francisco, California

(4) A. E. Schwartz, Officer and Director
L. H. Butcher Company
15th and Vermont Streets
San Francisco, California

commanding said officers and directors to bring and produce on behalf of the United States at the

time aforesaid before the Grand Jury sitting in the United States Courts and Post Office Building, San Francisco, California, the books, records, and documents described in the list attached hereto and made a part h reof, as Exhibit A. [1*]

And, subpoenas duces tecum returnable November 10, 1939, directed to the officers and directors of the corporations aforesaid, commanding said officers and directors to bring and produce on behalf of the United States at the time aforesaid before the grand jury sitting in the United States Courts and Post Office Building, San Francisco, California, the books, records, and documents described in the list attached hereto and made a part hereof, as Exhibit B.

FRANK J. HENNESSY
United States Attorney for the Northern District of California.

Dated at San Francisco, California, this 2nd day of November, 1939.

(Here follows duces tecum portion of subpoena.)

[Endorsed]: Filed Nov. 2, 1939. [2]

[Title of District Court and Cause.]

ORDER

On Petition of Frank J. Hennessy, United States Attorney for the Northern District of California, for Subpoenas in the above-entitled matter,

*Page numbering appearing at foot of page of original certified Transcript of Record.

It is hereby ordered that subpoenas duces tecum, returnable on November 6, 1939, directed to:

(1) Lloyd N. Cobbledick, Vice President
Cobbledick-Kibbe Glass Company
666 Howard Street
San Francisco, California

(2) Eugene Palmuth, President
Crowe Glass Company
675 Golden Gate Avenue
San Francisco, California

(3) A. H. Brawner, Officer and Director
W. P. Fuller & Company
301 Mission Street
San Francisco, California

(4) A. E. Schwartz, Officer and Director
L. H. Butcher Company
15th and Vermont Streets
San Francisco, California

commanding said officers and directors to bring and produce on behalf of the United States at the time aforesaid before the Grand Jury sitting in the United States Courts and Post Office Building, San Francisco, California, the books, records, and documents described in the list attached hereto and made a part hereof,* be issued, as prayed for in said Petition; and,

It is further ordered that subpoenas duces tecum, [3] returnable November 10, 1939, directed to the officers and directors to bring and produce on be-

*Exhibit A

half of the United States at the time aforesaid before the Grand Jury sitting in the United States Courts and Post Office Building, San Francisco, California, the books, records, and documents described in the list attached hereto and made a part hereof** be issued as prayed for in said Petition.

A. F. ST. SURE
United States District Judge.

Dated at San Francisco, California, this 2nd day of November, 1939.

(Here follows duces tecum portion of subpoena.)

[Endorsed]: Filed Nov. 2, 1939. [4]

[Title of District Court.]

SUBPOENA

The President of the United States of America

To EUGENE PALMUTH, President
Crowe Glass Company
675 Golden Gate Avenue
San Francisco, California, Greeting:

You and each of you are hereby commanded, That all and singular business and excuses being laid aside, you and each of you, be and appear in your proper person before the United States District Court, for the Northern District of California, at the Court Room, in the City and County of San

**Exhibit B

Francisco, on the 10th day of November, A. D. 1939, at 10 o'clock in the forenoon, to Testify the Truth, and give evidence before the Grand Jury, and you are not to depart the Court without the leave of the Court or of the U. S. Attorney, and bring with you and produce at the time and place aforesaid:

All original letters, telegrams, correspondence, reports, memoranda, and other communications (or copies thereof where the originals are not in the possession of Crowe Glass Company) incoming or outgoing, exchanged by or passing, during the period from July 1, 1935 to date, between Crowe Glass Company, its officers, agents, or employees, and Sam Goodman, individually or as a representative of the Glass Jobbers' Association of San Francisco and Oakland, and relating to:

(a) The use, distribution, delivery, shipment, purchase, sale, or price of flat glass in the San Francisco Bay area.

(b) The importation of flat glass from foreign countries into the San Francisco Bay area, and the preparation of statistics in connection with such imports.

(c) The collection of statistics on the volume of business done by the larger persons, firms, and corporations engaged in the flat glass business in the San Francisco Bay area.

(d) The preparation and maintenance of a book or ledger containing a registry of flat glass jobs available in the San Francisco Bay area.

(e) Services performed by said Sam Goodman in checking prices bid on flat glass jobs by various bidders in the San Francisco Bay area.

(f) The protection of the price structure of the large flat glass dealers in the San Francisco Bay area from efforts on behalf of the smaller flat glass dealers in said area to purchase flat glass at prices less than those established by the large dealers.

(g) The negotiation of agreements covering wages, hours, and working conditions between the Glass Jobbers' Association of San Francisco and Oakland and labor unions.

(h) Meetings between said Sam Goodman, individually or as a representative of the Glass Jobbers' Association of San Francisco and Oakland, and a representative or representatives of Crowe Glass Company, at which any of the subjects set forth in paragraphs numbered (a), (b), (c), (d), (e), (f), and (g) above were described.

And this you are not to omit, under pain of being adjudged guilty of a contempt of said Court.

Witness, the Hon. A. F. St. Sure, Judge of the United States District Court for the Northern District of California, and the seal of the said Court, this 2nd day of November, in the year of our Lord, one thousand nine hundred and thirty-nine and of the Independence of the United States of America the one hundred and sixty-fourth.

[Seal] WALTER B. MALING,

Clerk.

By J. P. WELSH,

Deputy Clerk.

MARSHAL'S RETURN

I have served this writ personally by copy on Eugene Palmuth, President Crowe Glass Company, at 675 Golden Gate Avenue, San Francisco, Calif., this 3rd day of November, A. D. 1939.

GEORGE VICE,

U. S. Marshal.

By WARREN D. CAIN,

Deputy.

[Endorsed]: M. D. 46000 Crim. Received Nov. 2, 1939. P. 430. U. S. Marshal's Office, San Francisco, Calif.

[Endorsed]: Filed Nov. 3, 1939.

In the District Court of the United States for the Northern District of California, Southern Division.

No. 2679

In the Matter of the Subpoena Returnable Before the Grand Jury Impaneled by the Honorable A. F. St. Sure, Judge of the above entitled Court, during the July term thereof, which Subpoena was issued out of and over the seal of said Court on November 2, 1939, directed to Eugene Palmuth, President Crowe Glass Company, 675 Golden Gate Avenue, San Francisco, California.

ORDER SHORTENING TIME

Good cause being shown,

It is hereby ordered that service of the motion and notice [6] of motion to quash the subpoena duces tecum on file herein may be made by serving a copy of said motion and of this order upon Morris R. Clark, Esq., or upon any special assistant to the attorney general in his office, or upon the office of the United States Attorney for the Northern District of California, not later than 12 M. on the 8th day of November, 1939, at San Francisco, California, and the court hereby dispenses with other, further and different notice of the hearing of said motion.

It is further ordered that said motion shall be forthwith placed on the law and motion calendar

for hearing on Thursday, the 9th day of November, 1939, at the hour of 10 o'clock A. M., or as soon thereafter as counsel may be heard.

Dated: November 8, 1939.

A. F. ST. SURE,
United States District Judge.

(Admission of service.)

[Endorsed]: Filed Nov. 8, 1939. [7]

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION TO QUASH SUBPOENA DUCES TECUM. [8]

To the United States of America and to James V. Hayes, Esq., and Morris R. Clark, Esq., Special Assistants to the Attorney General of the United States, its attorneys:

Please take notice that on Thursday, November 9, 1939, at the hour of 10 o'clock A.M., or as soon thereafter as counsel can be heard, Eugene Palmuth, individually and as president of Crowe Glass Company, a California corporation, and Crowe Glass Company, a California corporation, will move the Honorable, the above entitled court in the courtroom of the Honorable A. F. St. Sure, Judge thereof, in the Post Office Building, San Francisco, California, for an order with reference to the above described subpoena (a copy of which was handed to

and left with said Eugene Palmuth on or about November 3, 1939, and a copy of which is attached to the memorandum of points and authorities on file herein) as follows:

1. Quashing and vacating said subpoena;

2. Quashing and vacating the paragraph of said subpoena requiring the production of certain documents as purportedly described therein;

3. For such other and further relief as may be meet and proper in the premises.

Said motion will be made by the moving parties jointly and by each of them severally and will be made on the following grounds, severally and collectively:

1. Said subpoena duces tecum is oppressive, unreasonable and invalid because it does not call for documents but for information. The production of a document as purportedly called for by said subpoena would be tantamount to testimony that the document so produced passed between the parties described in said subpoena and related to the subjects enumerated therein;

2. The enforcement of said subpoena for testimonial purposes would require the party on whom the subpoena was served to [9] testify against himself, contrary to the Fifth Amendment;

3. Said subpoena cannot compel the witness to go through a file of papers to ascertain which ones "relate to" matters stated therein;

4. Said subpoena is oppressive, unreasonable and invalid because there is no showing by said subpoena, or otherwise, of the materiality or pertinence of the documents sought to be produced to any issue which the Federal Grand Jury has jurisdiction to consider;

5. Said subpoena is oppressive, unreasonable and invalid in that it asks for documents without regard to whether they relate to interstate or intrastate actions. Matters of intrastate commerce are beyond the jurisdiction of the Federal Grand Jury and beyond the reach of any subpoena issued in connection with its investigations;

6. Enforcement of said subpoena for testimonial purposes without any showing of the materiality or evidentiary value of the documents sought to be produced, and without any showing that they relate to matters within the jurisdiction of the Federal Grand Jury, would constitute an unlawful search and seizure contrary to the Fourth Amendment;

7. The enforcement of such subpoena would result in taking the property of the moving parties without compensation and without due process of law, contrary to the Fifth Amendment.

Said motion will be based on all records and files of this court relating to the Grand Jury investigation in connection with which said subpoena duces tecum was issued, on this motion and notice of motion, on the memorandum of points and authorities filed herewith and the copy of said subpoena at-

tached thereto, on the affidavit of Eugene Palmuth filed herein, and upon such oral testimony and other evidence as the court may permit to be [10] offered at the hearing herein.

Dated: San Francisco, California, November 7, 1939.

CHALMERS G. GRAHAM,
FELIX T. SMITH,
Attorneys for Eugene Palmuth, individually and as president of Crowe Glass Company, a corporation, and for Crowe Glass Company, a corporation.

CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco,
PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco,
Of Counsel.

(Admission of service.)

[Endorsed]: Filed Nov. 8, 1939. [11]

[Title of District Court and Cause.]

AFFIDAVIT OF EUGENE PALMUTH IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM. [12]

State of California,
City and County of San Francisco—ss.

Eugene Palmuth, being duly sworn, deposes and says that he is President and a director of Crowe Glass Company, with offices located at 675 Golden Gate Avenue, San Francisco, California; that he is familiar with the operation of the business of said company, but that many of the letters, telegrams, correspondence, reports, memoranda, and other communications called for by the subpoena duces tecum issued under the seal of this court, directed to affiant, and returnable November 10, 1939, are not matters of which affiant has personal knowledge; and that a large part of the letters, telegrams, correspondence, reports, memoranda and other communications contained in the files of said Crowe Glass Company are not identified in such a way that it can be ascertained upon the face thereof whether or not they constitute letters, telegrams, correspondence, reports, memoranda or other communications passing between Crowe Glass Company, its officers, agents, or employees and Sam Goodman, or relating to any of the subjects enumerated in said subpoena.

Dated: San Francisco, California, November 7, 1939.

EUGENE PALMUTH.

Subscribed and sworn to before me this 7th day of November, 1939.

FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California.

(Admission of service.)

[Endorsed]: Filed Nov. 8, 1939. [13]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM. [14]

(1) The subpoena duces tecum in the instant case is oppressive, unreasonable and invalid, because it does not call for documents but for information. The production of a document as called for by the subpoena would be tantamount to testimony that the document so produced passed between the parties described in the subpoena and related to the subjects therein enumerated.

A subpoena duces tecum is mechanical—not testimonial—in operation. It commands production of specific documents rather than the exercise of discretion or judgment by the witness. The witness' duty is to examine the subpoena and produce the very paper therein described.

"The duty of a witness under the writ as regulated by statute is simply to bring a specified paper to a designated place. Under a writ ad testificandum a party cannot make a man his lawyer, or physician, or scientific instructor by subpoenaing him as an * * * expert. Under neither writ is he entitled to the judgment, discretion, opinion or professional service of the witness."

Elting v. United States, 27 Ct. Cl. 158, 165.

The subpoena in the instant case does not describe any document with particularity but is obviously an attempt to determine whether any correspondence did pass between the parties described therein and to determine whether any of such correspondence, if it exists, relates to any of the special subjects enumerated therein. Essentially, what the subpoena calls for is information as to the existence of certain correspondence and the existence of certain factual situations. In other words, it seeks facts rather than documents.

" * * * the subpoena duces tecum is not proper to be used for the purpose of obtaining facts or information * * * or general inquisitorial examination of books * * * with a view to ascertaining whether something of value may not show up * * * ."

70 C. J. 51, sec. 37.

See, for example, as an illustration of the [15] violation of this principle by the present subpoena,

subparagraph (f) thereof, requiring the production of correspondence relating to the protection of the price structure of the large flat glass dealers in the San Francisco Bay area from efforts on behalf of the smaller flat glass dealers in said area to purchase flat glass at prices less than those established by the large dealers.

The Supreme Court of the United States, affirming refusal of a trial court to issue a subpoena duces tecum requiring the registrar of voters to furnish the number of white voters, of colored voters, and total number of voters who could sign their names, who had voted at the preceding congressional election, said:

> "The court was of opinion that either the defendant should have specified the books or documents required; or, *if he wished information* from the registrar, he should have subpoenaed him to attend and testify. We perceive no error in this action."
>
> Murray v. Louisiana, 163 U. S. 101, 107.

(2) Using the subpoena for testimonial purposes would require the party on whom the subpoena was served to testify against himself contrary to the Fifth Amendment.

There are, of course, authorities holding that a corporate officer cannot refuse to produce corporate records on the ground that they might tend to incriminate him personally. The situation contemplated by that rule is the production of documents

in response to a proper subpoena, in which the existence of the documents sought are known and the documents are described with particularity. The rule is not applicable to situations like the present one, in which the mere attempt to comply with the requirements of the subpoena would constitute testimony, that is, either an affirmance or a denial of the existence of the documents sought and of their relevance to the particular subjects enumerated in the subpoena. The use of a subpoena for such testimonial purposes and in such a [16] way that the party upon whom the subpoena was served has no opportunity to make claim of immunity constitutes in a very real sense the giving of testimony against himself in violation of his constitutional rights under the Fifth Amendment to the Constitution.

(3) A subpoena duces tecum cannot compel a witness to go through a file of papers to ascertain which ones "relate to" matters stated in the subpoena. Because this objection is very similar to the objection that a subpoena cannot be used for testimonial purposes, the case of Elting v. United States, 27 Ct. Cl. 158, 165, supra, is again pertinent. It was held therein that a party seeking documents or information by means of a subpoena duces tecum cannot compel the party on whom the subpoena is served

> "to go through a mass of papers and select those which in his [the witness's] judgment relate to the subject of litigation; *neither can he cast on the witness the responsibility of say-*

ing what papers do, and what papers do not, bear upon the issue to be tried" (italics ours).

In Rawlins v. Hall-Epps Clothing Co. (5th C.C.A., 1914), 217 Fed. 884, the court had before it orders for examination of the bankrupts and in disapproving of the scope of the orders, said (p. 887):

> "They are required, by its terms, to determine at their peril what books of account and other writings and memoranda are material to the ascertainment of any of the matters mentioned in the order and to be covered in the examination.
>
> We think this was requiring too much of the bankrupts. They should have been apprised by the order itself what specific books, writings, and memoranda they were required to produce."

See also:

Mobile Gas Co. v. Patterson (D.C., Ala., 1923) 288 Fed. 834, 886.

(4) The subpoena duces tecum is objectionable because there is no showing by the subpoena, or otherwise, of the materiality [17] or pertinence of the documents sought to be produced to any issue which the Federal Grand Jury has jurisdiction to consider.

As said by Mr. Justice Holmes, in Fed. Trade Comm. v. Amer. Tobacco Co. (1924), 264 U.S. 298,

a case involving an attempt to compel disclosure of records to the Federal Trade Commission in a Sherman Act proceeding (p. 306):

> "The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer. Wigram, Discovery, 2d. ed., sec. 293. We assume that the rule to be applied here is more liberal but still a ground must be laid and the ground and the demand must be reasonable. Essgee Co. v. United States, 262 U.S. 151, 156, 157. A general subpoena in the form of these petitions would be bad."

In Carpenter v. Winn (1911), 221 U.S. 533, a grand jury case, the court said, with reference to bills of discovery, that such a bill (p. 540):

> " * * * cannot be used merely for the purpose of enabling the plaintiff in such a bill to pry into the case of his adversary to learn its strength or weakness. A discovery sought upon suspicion, surmise or vague guesses is called a 'fishing bill,' and will be dismissed. * * * Such a bill must seek only evidence which is *material* to the support of the complainant's

own case, and prying into the nature of his adversary's case will not be tolerated" (italics ours).

The same idea was expressed by Mr. Justice Cardozo, when on the Court of Appeals, in People v. Supreme Court (N.Y., 1927), 156 N.E. 84, wherein he said (p. 85):

"Documents are not subject to inspection for the mere reason that they will be useful in supplying a clew whereby evidence can be gathered. Documents to be subject to inspection must be *evidence* themselves" (citing cases) (italics ours).

See, generally:

Fed. Trade Comm. v. Amer. Tobacco Co. (1924), 264 U.S. 298, 305 (supra); [18]

United States v. Terminal R. Ass'n. (C.C., Mo., 1907), 154 Fed. 268, collecting cases;

Third Nat. Bank & Trust Co. v. United States (6th C.C.A., 1931), 53 F. (2d) 599;

United States v. Aluminum Co. of America (D.C. N.Y., 1939), 26 F. Supp. 711.

(5) The subpoena duces tecum is oppressive, unreasonable and invalid in that it asks for documents without regard to whether they relate to interstate or intrastate transactions. Matters of intrastate commerce are beyond the jurisdiction of the Federal Grand Jury and beyond the scope of any subpoena issued in connection with its investigation.

In Fed. Trade Comm. v. Amer. Tobacco Co., 264 U.S. 298, supra, the court said (p. 307):

> "The demand was not only general but extended to the records and correspondence concerning business done wholly within the State. This is made a distinct ground of objection. We assume for present purposes that even some part of the presumably large mass of papers relating only to intrastate business may be so connected with charges of unfair competition in interstate matters as to be relevant, Stafford v. Wallace, 258 U.S. 495, 520, 521, but that possibility does not warrant a demand for the whole."

To the same effect, see Federal Trade Commission v. Smith (D.C., N.Y., 1929), 34 F. (2d) 323, 324.

(6) Enforcement of subpoena duces tecum for testimonial purposes, without any showing of the materiality of the documents sought to be produced and without any showing that they relate to matters within the jurisdiction of the Federal Grand Jury, would constitute an unlawful search and seizure contrary to the Fourth Amendment.

A corporation may, of course, be compelled by *due and lawful process* to produce its books and papers; if the requirements, however, of a subpoena duces tecum requiring such production are [19] not confined *"within limits which reason imposes in the circumstances of the case,"* it is not "due and lawful" in that the constitutional guaranty against unreasonable search is thereby violated.

The unlimited and unreasonable requirements of the process here involved have been hereinbefore pointed out. It specifies no particular paper but requires an indiscriminate search through the corporation's records, relevant or irrelevant, in the hope that something will turn up.

In a case cited with approval in Hale v. Henkel, 201 U.S. 43, the Supreme Court of Missouri said:

> "To permit an indiscriminate search among all the papers in one's possession for no particular paper, but some paper, which may throw some light on some issue involved in the trial of some cause pending, would lead to consequences that can be contemplated only with horror, and such a process is not to be tolerated among a free people. A grand jury has a general inquisitorial power. They may ask a witness * * * without reference to any particular offense which is the subject of inquiry, what he knows touching the violation of any section of the criminal code. Give such a body, in addition, the power to search any man's papers for evidence of some crime committed, and you convert it into a tribunal which would soon become as odious to American citizens as the Star Chamber was to Englishmen, or the Spanish Inquisition to the civilized world."

Ex Parte Brown, 72 Mo. 83, 94.

See, also:

Fed. Trade Comm. v. Amer. Tobacco Co., 264 U.S. 298, 306;

Bank of America v. Douglas (D.C., App.), 105 F. (2d) 100, 106-107;

Go-Bart Co. v. United States, 282 U.S. 344, 356-357.

(7) Enforcement of said subpoena would result in the taking of property of the moving party without compensation and [20] without due process of law, contrary to the Fifth Amendment.

Dated: San Francisco, California, November 7, 1939.

Respectfully submitted,

CHALMERS G. GRAHAM,
FELIX T. SMITH,

Attorneys for Eugene Palmuth, individually and as president of Crowe Glass Company, a corporation, and for Crowe Glass Company, a corporation.

CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco,

PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco,

Of Counsel.

(Here follows a copy of the subpoena duces tecum.)

(Admission of service.)

[Endorsed]: Filed Nov. 8, 1939. [21]

In the District Court of the United States of America for the Northern District of California, Southern Division.

No.

In the Matter of the Subpoena Returnable Before the Grand Jury Impaneled by the Honorable A. F. St. Sure, Judge of the above entitled Court, during the July term thereof, which Subpoena was issued out of and over the seal of said Court on November 2, 1939, directed to Lloyd N. Cobbledick, Vice President of Cobbledick-Kibbe Glass Company, 666 Howard Street, San Francisco, California.

No.

In the Matter of the Subpoena Returnable Before the Grand Jury Impaneled by the Honorable A. F. St. Sure, Judge of the above entitled Court, during the July term thereof, which Subpoena was issued out of and over the seal of said Court on November 2, 1939, directed to A. H. Brawner, Officer and Director, W. P. Fuller & Company, 301 Mission Street, San Francisco, California.

No.

In the Matter of the Subpoena Returnable Before the Grand Jury Impaneled by the Honorable A. F. St. Sure, Judge of the above entitled Court, during the July term thereof, which Subpoena was issued out of and over the seal

of said Court on November 2, 1939, directed to Eugene Palmuth, President Crowe Glass Company, 675 Golden Gate Avenue, San Francisco, California.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTIONS TO QUASH SUBPOENAS DUCES TECUM. [22]

SUMMARY OF POINTS AND AUTHORITIES

1. The Subpoena herein is reasonable and proper and is not unduly oppressive, and, in numerous instances, the Federal Courts have upheld Subpoenas Duces Tecum which were much broader in scope.

Brown v. United States, 276 U. S. 134 (1928)
Consolidated Rendering Company v. Vermont, 207 U. S. 541 (1908)
Nelson v. United States, 201 U. S. 92 (1906)
In re Investigation Conducted by the Attorney General, 27 Fed. Supp. 997 (D.C. S.D. N.Y., 1939)
United States v. Medical Society, 26 Fed. Supp. 55 (D.C. D.C., 1938)
In re The Petition of the Borden Company (an unreported opinion D.C. W.D. Ill., 1938)
Norcross v. United States, 209 Fed. 13 (C. C. A. 9, 1913)

2. An officer of a corporation served with a Subpoena Duces Tecum to produce books and rec-

ords of the corporation cannot refuse to produce the records upon the grounds that the documents produced would tend to incriminate the corporation or himself.

Essgee Company v. United States, 262 U. S. 151 (1923)

Dreier v. United States, 221 U. S. 394 (1911)

Wilson v. United States, 221 U.S. 361 (1911)

Wheeler v. United States, 226 U. S. 478 (1913)

Grant and Burlingame v. United States, 227 U.S. 74 (1913)

3. The Subpoena Duces Tecum herein questioned does not constitute an unreasonable search and seizure in violation of the Fourth Amendment, nor deprivation of property without due process of law within the meaning of the Fifth Amendment.

Nelson v. United States, 201 U. S. 92 (1906)

Consolidated Rendering Company v. Vermont, 207 U. S. 541 (1908) [23]

Norcross v. United States, 209 Fed. 13, (C. C. A. 9, 1913)

In re Investigation Conducted by the Attorney General, 27 Fed. Supp. 997 (D.C. S.D. N.Y. 1939)

In re Petition of the Borden Company (an unreported opinion, D. C. N.D. Ill., 1938).

Essgee Company v. United States, 262 U. S. 151 (1923)

4. The use of the term "relating to" is sufficiently definite to enable the parties subpoenaed to determine what documents are called for. It is not necessary that each document, book, record, memorandum or paper be separately and individually described, provided that such subjects and subject matters are specifically enumerated and described and there is proper limitation as to the period of time which the documents called for are to cover.

   Brown v. United States, 276 U.S. 134 (1928)
   Nelson v. United States, 201 U.S. 92 (1906)
   Consolidated Rendering Company v. Vermont, 207 U.S. 541 (1908)
   Norcross v. United States, 209 Fed. 13 (C. C. A. 9, 1913)
   United States v. Medical Society, 26 Fed. Supp. 55 (D.C. D.C., 1938)
   In re Investigation Conducted by the Attorney General, 27 Fed. Supp. 997 (D.C. D.S. N.Y. 1939)
   In re Petition of the Borden Company (an unreported opinion D.C. W.D. Ill., 1938)

5. One Subpoenaed Duces Tecum in connection with a grand jury investigation under the anti-trust laws has no standing to challenge the grand jury's jurisdiction and cannot refuse to produce called-for documents on the grounds that some

of the transactions to which they relate are of an intrastate character.

Blair v. United States, 250 U.S. 273 (1919)
In re Medical Association, Chicago, Illinois, 26 Fed. Supp. 58, (D.C. D.C. 1938) [24]

6. Where Subpoenas Duces Tecum are issued to compel the production of documentary evidence before a grand jury, no showing as to relevancy and materiality of such evidence is required prior to the issuance of such subpoenas, or apart from the Duces Tecum clause therein contained. The materiality of evidence sought to be secured by Subpoenas Duces Tecum is a matter for determination not by those who may be subpoenaed, but the court in the light of the nature of the investigation, and with the widest latitude permitted to the Government.

Nelson v. United States, 201 U. S. 92 (1906)
Norcross v. United States, 209 Fed. 13 (C. C. A. 9, 1913)
In re Subpoenas Duces Tecum, 248 Fed. 137 (D.C. E.D. Tenn. S.D. 1916)
In re Black, 47 Fed. (2d) 542 (C.C.A. 2d, 1931)
Brown v. United States, 276 U. S. 134 (1928)
Blair v. United States, 250 U. S. 273 (1919)
Wilson v. United States, 221 U.S. 361 (1911)

7. Not a single case cited by movants in support of their motions to quash involved grand jury

investigations. Thus they are not authority in support of the present motions.

(a) The cases relied upon by movants and the type of proceedings involved therein are as follows:

Elting v. United States, 27 Ct. Cl. 158, 165 (Court of Claims)

Federal Trade Commission v. American Tobacco Company, 264 U. S. 298 (1924) (Federal Trade Commission)

Rawlins v. Hall Epp Clothing Company, 217 Fed. 884 (C.C.A. 5, 1914) (Bankruptcy)

Mobile Gas Company v. Patterson, 280 Fed. 884, 886 (D.C. Ala., 1923) (Bankruptcy)

Carpenter v. Winn, 221 U. S. 533 (1911) (Equity)

United States v. Terminal R. R. Association, 154 Fed. 268 (C.C. Mo., 1907) (Equity)

Third National Bank & Trust Company v. United States, 53 Fed. (2d) 599 (C.C.A. 6, 1931) (Equity) [25]

United States v. Aluminum Company of America, 26 F. Supp. 711 (D.C. S.D. N.Y. 1939) (Equity)

Federal Trade Commission v. Smith, 34 Fed. (2d) 323, 324 (D.C. N.Y. 1929) (Federal Trade Commission)

Go-Bart Company v. United States, 282 U.S. 344, 356-357 (1931) (Civil action for an injunction against use of evidence obtained on search warrant)

Bank of America v. Douglas, 105 Fed. (2d) 100, 106-107 (App. D.C. 1939) (Securities Exchange Commission)

Murray v. Louisiana, 163 U. S. 101, 107 (1890) (Action at law to Quash an Indictment)

People v. Supreme Court, 156 N. E. 84 (N.Y. 1927) (Action at law to compel production of evidence)

(b) The case of Carpenter v. Winn, 221 U. S. 533 (1911) which movants on page 5 of their memoranda of points and authorities in support of motions to quash expressly state was a grand jury case, did not involve a grand jury investigation. The nature of that case was set forth by the court in its opinion (p. 537):

> "The question is whether under Section 724 of the Revised Statutes, a court of law may compel one party to an action to produce, in advance of the trial, books and papers for examination and inspection by his adversary."

Respectfully submitted,

JAMES V. HAYES
MORRIS R. CLARK
JOHN V. LEDDY
SAM E. NEEL
ROBERT DILLER
GEORGE F. FISHER, JR.

Special Assistants to the Attorney General.

[Endorsed]: Filed Nov. 9, 1939. [26]

District Court of the United States, Northern District of California, Southern Division.

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 9th day of November, in the year of our Lord one thousand nine hundred and thirty-nine.

Present: the Honorable A. F. St. Sure, District Judge.

No. 2679
(Miscellaneous)

In the Matter of the Motions of Lloyd N. Cobbledick, Vice President of Cobbledick-Kibbe Glass Co., and Cobbledick-Kibbe Glass Co., A. H. Brawner, officer and director of W. P. Fuller & Co., and W. P. Fuller & Co., and Eugene Palmuth, President of Crowe Glass Co., and Crowe Glass Co., to quash Subpoenas Duces Tecum to appear before the United States Grand Jury, July 1939 term of this Court.

The motions of Lloyd N. Cobbledick, Vice President of Cobbledick-Kibbe Glass Co., and Cobbledick-Kibbe Glass Co., A. H. Brawner, Officer & Director of W. P. Fuller & Co., and W. P. Fuller & Co., and Eugene Palmuth, President of Crowe Glass Co., and Crowe Glass Co., to quash subpoenas duces tecum to appear before the United States Grand Jury, July 1939 term of this Court, came on regularly this day for hearing. Felix T. Smith,

Esq., and Chalmers G. Graham, Esq., appearing as attorneys for the moving parties, and James V. Hayes, Esq., and Morris R. Clark, Esq., Special Assistants to the Attorney General, appearing upon behalf of the United States.

The various motions were argued by Mr. Smith and Mr. Hayes and submitted to the Court for consideration and decision. Now, after due consideration had thereon, it is ordered that each of said motions to quash be and the same are hereby denied, and to which ruling the moving parties were allowed an exception.

Mr. Smith thereupon gave oral Notice of Appeal upon behalf of each of the moving parties. Mr. Smith moved the Court to grant a stay of execution herein. After hearing Mr. Smith and Mr. Hayes, it is ordered that each of the moving parties be allowed until November 13, 1939, within which time to prepare, serve and file their appeal papers.

[27]

In the Southern Division of the United States District Court, in and for the Northern District of California.

Before: HON. A. F. ST. SURE, Judge.

No. 2679—Misc.

In the Matter of the Petitions of LLOYD N. COBBLEDICK, Vice-President of Cobbledick-Kibbe Glass Company, A. H. BRAWNER, Vice-President and Director W. P. Fuller & Co., and EUGENE PALMUTH, President Crowe Glass Company, to Quash Subpoenaes Duces Tecum to Appear Before U. S. Grand Jury July, 1939 Term of this Court.

TESTIMONY

Friday, November 10, 1939.

Counsel Appearing:

For the United States: James V. Hayes, Esq. and Morris R. Clark, Esq., Special Assistants to the Attorney General of the United States.

For the Petitioners: Felix T. Smith, Esq., Chalmers G. Graham, Esq., Henry G. Hayes, Esq.

Mr. Henry G. Hayes: As your Honor knows, yesterday the motions to quash subpoenaes duces tecum before the Grand Jury were argued and were denied.

The Court: Yes.

Mr. Henry G. Hayes: At that time Mr. Smith gave notice of appeal, and asked for a stay, and your Honor was uncertain as to whether your Honor had jurisdiction to enlarge the time for appearance before the Grand Jury. As you know, Mr. Felix Smith wrote you a letter, of which a copy has been handed to counsel for the Government, submitting authorities——

The Court: I haven't seen the letter. It is probably on my desk. [28]

Mr. James V. Hayes: Here is a copy supplied to the Government, your Honor.

The Court: In the letter Mr. Smith says he admits the Court has the power to make an appropriate order to preserve the status quo. What do you wish to say about it? The only question is whether or not the Court will make the order.

Mr. Henry G. Hayes: Well, it is a matter for the Court, your Honor, but our feeling is that an appearance by the witnesses to-day would, in reality, be an appearance pending the appeal.

The Court: I don't know whether I would want to make any order at all. It would depend on what the Government thinks about the matter. In other words, if the Governme prepared to go ahead with the witnesses, the Grand Jury is in session, and I might conclude the hearing should go ahead.

Mr. Henry G. Hayes: Despite the pendency of the appeal, your Honor? I would say that makes the appeal valueless.

The Court: I don't think there is anything in the point that Mr. Smith makes at this time.

Mr. Henry G. Hayes: Well, we, of course, feel, first, your Honor, that if we ask——

The Court: I understand. I believe you are acting in good faith in the matter.

Mr. Henry G. Hayes: I might suggest, your Honor, as Mr. Smith did in his letter, I believe, that in the Grand Jury case down South an enlargement of time in the District Court was obtained by stipulation of counsel, and when the case got up into the Circuit Court of Appeals the time was enlarged in the Circuit Court. [29]

The Court: I don't know how the Government feels about the matter. Do you want to continue with the proceedings?

Mr. James V. Hayes: Yes, your Honor. The Grand Jury is presently waiting for us to appear before it.

The Court: Well, you have looked into the case, have you?

Mr. James V. Hayes: Yes, we have, your Honor. The law, as we see it, first of all the cases cited by counsel do not have anything to do with any duty on the Court——

The Court: No, I think the Court——

Mr. James V. Hayes: We don't believe there is any question in regard to the Court's power to control the Grand Jury.

The Court: I think I could do that. The only thought I had was whether or not I wanted to continue the matter, hold up further proceedings before the Grand Jury, whether or not I would have the power to do that.

Mr. Henry G. Hayes: Your Honor, as I recall, counsel will check me, I think, that you made a suggestion yesterday of continuing the matter until Monday if you felt you had the jurisdiction to do that.

The Court: Well, I did not—all I said to Mr. Smith was to take his appeal, and he promised me he would do that.

Mr. Henry G. Hayes: Yes; that was filed this morning, your Honor.

The Court: And that has been attended to. I can't see any good reason to hold up the proceedings of the Grand Jury.

(After discussion a recess was taken until 11:30 A. M.)

The Court: Well, gentlemen, is there anything further you wish to say to the Court about this matter?

Mr. Felix Smith: Well, your Honor, our position is that we [30] have a serious question, and a very difficult question. As a matter of fact, if your Honor should order these witnesses to produce these documents I would have the gravest difficulty, myself, in

telling them what they ought to produce, in that it is impossible to tell from this subpoena what the duties of the witness are. We think that is a serious matter, and we should be allowed to present it to the Circuit Court of Appeals. I realize your Honor does not sympathize with our view, but I think we should be permitted to present that matter to the Court in the regular way.

Now, if your Honor does not wish to make a stay, of course, that is within your Honor's discretion, but I think your Honor ought to permit us to make an application to the Circuit Court of Appeals for a stay.

The Court: Well, how much time do you want for that?

Mr. Smith: Well, I believe that will have to rest within the judgment of the Circuit Court of Appeals. I can go into the Circuit Court of Appeals and try to see the Presiding Justice this morning. I don't know whether he is even in town. I could confer with him this morning. I think he should have very definite ideas about when the Court could hear a motion of that kind.

The Court: It would seem now that it would be a mistake for this Court to hold up the proceedings of the Grand Jury until your appeal is decided.

Mr. Smith: I realize that is the attitude your Honor has. As I say, I would want to expedite the appeal, but I think that, holding your Honor's view, your Honor still would feel that it was the proper

thing to allow sufficient time to make an application to the Circuit Court of Appeals.

The Court: Yes. I am wondering how much time would be [31] necessary for you to do that. It is almost twelve o'clock now, twenty-five minutes to twelve.

Mr. Smith: Yes.

The Court: Tomorrow is a legal holiday, it is a national holiday, and then comes Sunday. I wonder how long——

Mr. Smith: It might be the Circuit Court of Appeals in an application of this kind would hear it Monday morning. I assume that counsel for the United States would co-operate with us in having a matter of that kind taken up promptly?

The Court: Yes. Perhaps it would be well if the United States Attorney and you and myself go and see the Senior Circuit Judge of the Court of Appeals.

Mr. Smith: I hate to impose upon your Honor that way, but that would, I think——

The Court: Oh, no, no.

Mr. Smith (Continuing) —be the most expeditious way of attending to the matter.

The Court: We may impress upon the Court the necessity of hearing the matter at an early date. Do you see any objection to that?

Mr. James V. Hayes: I see no objection to it, your Honor, if such an application should be made to the Circuit Court of Appeals to-day, but I would

freely consent to an adjournment of the subpoenaes if I believed there was any merit in the argument advanced. Convinced, as I am, that there is no merit in it, and with the Grand Jury actually sitting, waiting for the witnesses, and seeking to conclude its investigation, and feeling that this is an effort to secure further delay, I don't feel I can, in conformance with my duty in the circumstances, make any consent which would require a longer delay than certainly Monday.

The Court: Well, I wouldn't ask any consent. I wouldn't ask [32] you to consent, but I am wondering what the best thing to do under the circumstances would be. We can see Judge Wilbur at this time and ask him if he can take it up on Monday.

Mr. Smith: Shall I see if he is there, your Honor?

The Court: I say, we can go and see him.

Mr. Smith: I see, your Honor.

(After recess):

The Court: Since we conferred with Judge Wilbur I take it, gentlemen, that there will be no objection to the Court's adjourning the subpoenaes before the Grand Jury until next Wednesday morning at ten o'clock.

Mr. James V. Hayes: That is correct, your Honor.

The Court: Is there anything further you wish to say?

Mr. James V. Hayes: Except this, that that agreement by the Government was on the condition that counsel submit a brief and record to the Circuit

Court on Monday and ask for a hearing on the merits. The Government will have its brief ready at the same time.

The Court: Mr. Smith, you desire a hearing at the earliest time, do you not?

Mr. Smith: Yes, your Honor. It will have to be a typewritten brief and transcript.

The Court: Yes. I think there will be no question about the Court permitting you to proceed that way, in so far as the record is concerned.

Mr. Smith: Your Honor, I will have a typewritten transcript and brief ready Monday.

Mr. James V. Hayes: The Government will be ready with its brief on Monday.

Mr. Smith: May I suggest the record in the Circuit Court of Appeals will be better if the Court makes an order denying [33] my motion to stay the proceedings under the three subpoenaes duces tecum and continue the return date on the subpoenaes until Wednesday morning.

The Court: Motion is denied and an exception noted. [34]

CERTIFICATE OF OFFICIAL PHONOGRAPHIC REPORTER

State of California,
City and County of San Francisco—ss.

I, Kenneth G. Gagan, hereby certify that I am an official shorthand reporter of the United States District Court for the Northern District of California,

and that as such reporter I took down in shorthand writing on the 10th day of November, 1939, the proceedings had in the matter entitled in the caption hereof, fully, truly and correctly, to the best of my ability; that I thereafter caused my said shorthand writing to be transcribed into typewriting, and that the foregoing 7 pages constitute said transcript; that the same is a full, true and correct transcription of my said shorthand notes aforesaid, and is a full, true, accurate and correct transcription of said proceedings in said matter.

Dated, San Francisco, Calif., November 10, 1939.

KENNETH G. GAGAN,
Official Shorthand Reporter.

[Endorsed]: Filed Nov. 10, 1939. [35]

[Title of District Court.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 10th day of November, in the year of our Lord one thousand nine hundred and thirty-nine.

Present: the Honorable A. F. St. Sure,
District Judge.

[Title of Cause.]

In this matter Felix T. Smith, Esq., Attorney for the moving parties herein, moved the Court to stay proceedings on Subpoenas Duces Tecum issued to—

Lloyd N. Cobbledick, Vice President of Cobbledick-Kibbe Glass Co.,
A. H. Brawner, Officer & Director of W. P. Fuller & Co., and
Eugene Palmuth, President of Crowe Glass Co.,

requiring them, and each of them, to appear before the United States Grand Jury, July 1939 Term of this Court.

After hearing Mr. Smith and James V. Hayes, Esq., Special Assistant to the Attorney General, in opposition thereto, It Is Ordered that said motion be and the same is hereby Denied. The moving parties were allowed an exception to the ruling of the Court.

Further ordered that the return day of each subpoena be extended until Wednesday, November 15, 1939, at 10 o'clock a. m. [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL [37]

Notice is hereby given that Eugene Palmuth, individually, Eugene Palmuth, President, Crowe Glass Company, a California corporation, and Crowe Glass Company, a California corporation, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the District Court of the United States for the Northern District of California, Southern Division,

made November 9, 1939, denying the motion of Eugene Palmuth, individually, and as President of Crowe Glass Company, a California corporation, and of said Crowe Glass Company, a California corporation, to quash and vacate each paragraph and each lettered subdivision of each paragraph of that certain subpoena duces tecum directed to said Eugene Palmuth, President, Crowe Glass Company, issued out of and under the seal of said District Court of the United States under date of November 2, 1939, which said order was entered on or about November 9, 1939.

Dated: San Francisco, California, November 9, 1939.

CHALMERS G. GRAHAM
Robert Dollar Building,
San Francisco, California.
Telephone: Garfield 8700.
FELIX T. SMITH
Standard Oil Building,
San Francisco, California.
Telephone: Garfield 6133.
Attorneys for Eugene Palmuth, individually, Eugene Palmuth, President, Crowe Glass Company, and Crowe Glass Company.

PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco, California.
CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco.
Of Counsel.

[Endorsed]: Filed Nov. 10, 1939. [38]

BOND

Know All Men By These Presents:

That we, Eugene Palmuth, individually and as president of Crowe Glass Company, a corporation organized and existing under and by virtue of the laws of the State of California, having an office and place of business at 675 Golden Gate Avenue, City and County of San Francisco, State of California, and said Crowe Glass Company, a corporation as aforesaid, as principals, and Pacific Indemnity Company, duly authorized to transact a surety business, as surety, are held and firmly bound unto the United States of America in the full and just sum of two hundred and fifty dollars ($250), to be paid to the said United States of America; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and

administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of November, 1939.

Whereas said Eugene Palmuth, individually and as president of Crowe Glass Company, a corporation, and said Crowe Glass Company, a corporation, have this day appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the said District Court of the United States for the Northern District of California, Southern Division, made November 9, 1939, denying the motion of Eugene Palmuth, individually and as president of Crowe Glass Company, a corporation, and of said Crowe Glass Company, a corporation, to quash and vacate each paragraph and each lettered subdivision of each paragraph of that certain subpoena duces tecum directed to said Eugene Palmuth, President, Crowe Glass Company, issued out of and under the seal of said District Court of the United States under date of November 2, 1939, which said order was entered on or about November 9, 1939;

Now, Therefore, the condition of this obligation is such that if Eugene Palmuth, individually and as president [39] of Crowe Glass Company, and said Crowe Glass Company shall answer all damages and costs if said appeal is dismissed or said order is affirmed, or such costs as said Circuit Court of Appeals may award if said order is modified.

then this obligation to be void, otherwise to remain in full force and virtue.

It is further expressly understood and agreed that, in case of breach of any condition of the above obligation, the court in the above entitled matter may, upon notice to the Pacific Indemnity Company of not less than ten (10) days, proceed summarily in said matter to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it, and award execution therefor.

[Seal] EUGENE PALMUTH

[Seal] EUGENE PALMUTH
President of Crowe Glass Company

[Seal] CROWE GLASS COMPANY,
By EUGENE PALMUTH
President

[Seal] PACIFIC INDEMNITY COMPANY,
By R. R. PAULTON
Attorney-in-Fact

State of California,
City and County of San Francisco—ss.

On this 9th day of November in the year one thousand nine hundred and thirty-nine, before me, Emily K. McCorry, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared R. R. Poul-

ton, known to me to be the duly authorized Attorney-in-Fact of Pacific Indemnity Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said R. R. Poulton acknowledged to me that he subscribed the name of Pacific Indemnity Company, thereto as surety and his own name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] EMILY K. McCORRY

Notary Public in and for City and County of San Francisco, State of California.

My commission expires December 30, 1942. [40]

State of California,
City and County of San Francisco—ss.

On this 9th day of November, 1939, before me Frank L. Owen, a notary public in and for said city and county and state, residing therein, duly commissioned and sworn, personally appeared Eugene Palmuth, known to me to be the person who subscribed to the foregoing bond, individually and as president of Crowe Glass Company, and known to me to be the president of Crowe Glass Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it for and on behalf of the corporation therein named, and he acknowledged to

me that he executed the foregoing instrument individually and as president of Crowe Glass Company, and that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the city and county and state aforesaid the day and year in this certificate first above written.

[Seal] FRANK L. OWEN

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 10, 1939. [41]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the United States of America, and James V. Hayes and Morris R. Clark, special assistants to the Attorney General, its attorneys:

You are hereby advised that there has been this day [42] filed in the above entitled matter notice of appeal and bond on appeal by Eugene Palmuth, individually, and as President of Crowe Glass Company, a corporation, and by said Crowe Glass Company, a corporation, from the order of the Honorable A. F. St. Sure, District Judge, made and entered in the above entitled matter on November 9, 1939, and that said appellants designate the en-

tire record in said proceeding, including the following papers:

1. Petition for and order filed with the clerk of said court on or about the ..... day of ....., 1939, directing the issuance of subpoena duces tecum, addressed to Eugene Palmuth, President, Crowe Glass Company, 675 Golden Gate Avenue, San Francisco, California;

2. Subpoena duces tecum issued on November 2, 1939, addressed to said Eugene Palmuth, President, Crowe Glass Company, 675 Golden Gate Avenue, San Francisco, California;

3. Return showing service of said subpoena duces tecum on said Eugene Palmuth, President, Crowe Glass Company, 675 Golden Gate Avenue, San Francisco, California;

4. Motion and notice of motion of said Eugene Palmuth, individually, and as President of Crowe Glass Company, a corporation, and of said Crowe Glass Company, a corporation, to quash said subpoena duces tecum, said notice being dated November 7, 1939, together with the affidavit of Eugene Palmuth in support th reof, and copy of said subpoena duces tecum, and memoranda of points and authorities;

5. Order shortening time for the service of said notice of motion to quash subpoena duces tecum, dated November 8, 1939;

6. Order of the above entitled court made by the Honorable A. F. St. Sure, Judge thereof, and

entered on or about November 9, 1939, denying said motion to quash;

7. Notice of appeal from said order denying said motion [43] to quash, dated November 10, 1939, and filed November 10, 1939, together with bond on appeal in the sum of two hundred and fifty dollars ($250);

8. Order of the above entitled court made by the Honorable A. F. St. Sure, Judge thereof, and entered on November 10, 1939, denying a motion to stay the proceedings under said subpoena duces tecum pending the appeal;

9. Reporter's transcript of the proceedings at the hearing on November 10, 1939, at which the oral motion for a stay pending appeal was denied by the Honorable A. F. St. Sure, Judge of said District Court.

Dated: San Francisco, California, November 10, 1939.

CHALMERS G. GRAHAM
Robert Dollar Building,
San Francisco
FELIX T. SMITH
Standard Oil Building,
San Francisco
Attorneys for Eugene Palmuth, individually, and as President of Crowe Glass Company, and for Crowe Glass Company.

CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco
PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco
Of Counsel.

(Admission of Service) [44]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 44 pages, numbered from 1 to 44, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of the motion of Eugene Palmuth, etc. et al to quash grand jury subpoena No. 2679, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $6.55 and that the said amount

has been paid to me by the Attorneys for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of November A. D. 1939.

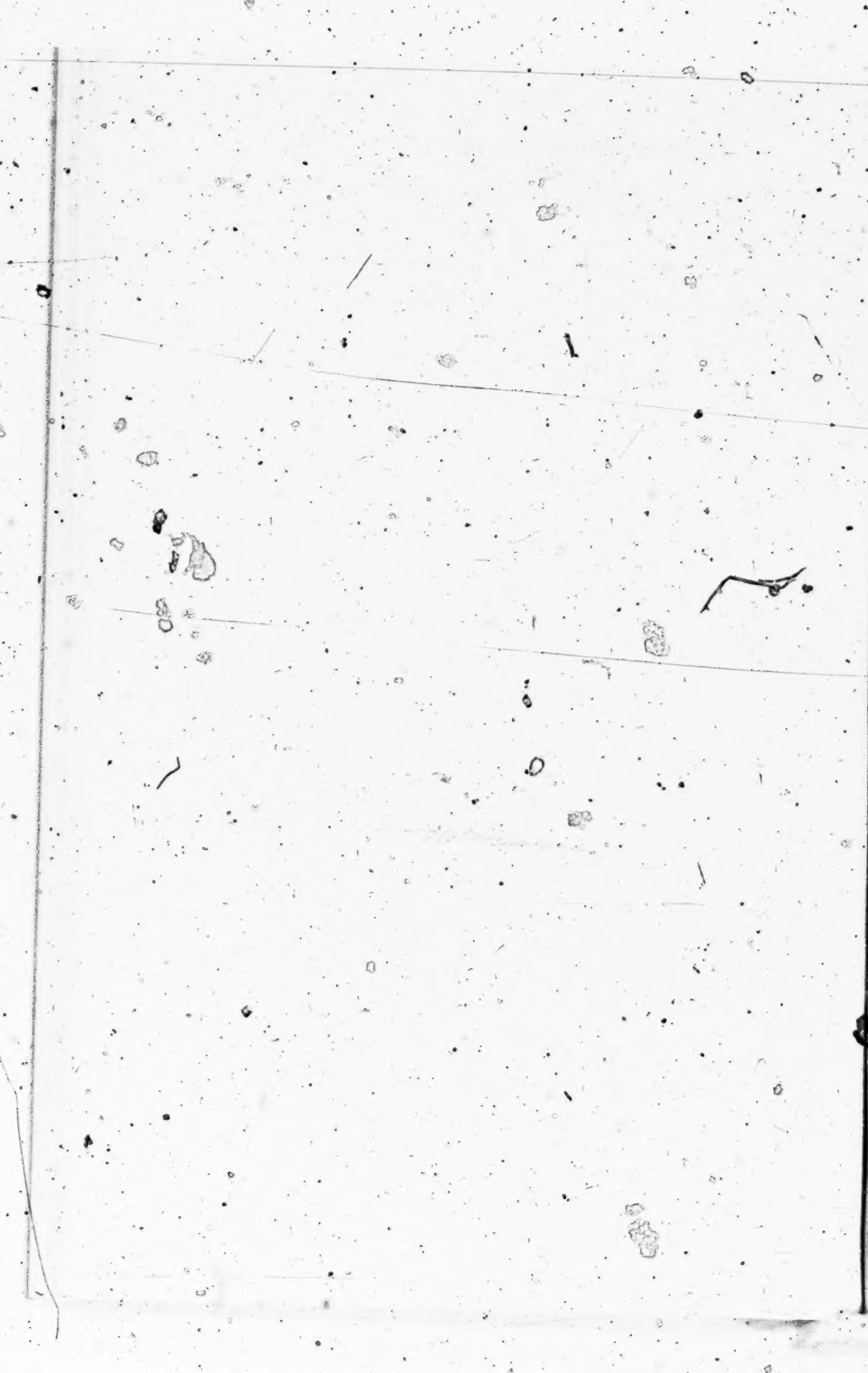
[Seal] WALTER B. MALING
Clerk

J. P. WELSH
Deputy Clerk. [45]

[Endorsed]: No. 9362. United States Circuit Court of Appeals for the Ninth Circuit. Eugene Palmuth, Individually, and as President of Crowe Glass Company, and Crowe Glass Company, a Corporation, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed November 13, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.



No. 9362

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EUGENE PALMUTH, Individually, and as President of Crowe Glass Company, and CROWE GLASS COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal From the District Court of the United States for the Northern District of California, Southern Division

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR STAY OF PROCEEDINGS ON SUBPOENA DUCES TECUM PENDING APPEAL.

To the United States of America, and to Messrs. James V. Hayes, Esq., and Morris R. Clark, Esq., Special Assistants to the Attorney General, its attorneys:

You and each of you will please take notice that Eugene Palmuth, individually and as president of Crowe Glass Company, a corporation, and Crowe Glass Company, a corporation, appellants in the above entitled matter, will, on Monday, the 13th day of November, 1939, at the hour of 10:00 A. M. of said day, or as soon thereafter as counsel can be heard, apply to the above entitled court at its courtroom in the Post-Office Building, in the City and County of San Francisco, State of California, for an order staying the operation of the subpoena duces tecum involved in said appeal pending the determination of said appeal or the further order of this court.

Said motion will be made upon the ground that such order is necessary in order to preserve the status quo pending said appeal.

Said motion will be based upon the records, papers and files in the above entitled matter and on the memorandum of points and authorities attached hereto.

Dated: November 13, 1939.

CHALMERS G. GRAHAM
FELIX T. SMITH
Attorneys for Eugene Palmuth, individually and as president of Crowe Glass Company, a corporation, and for Crowe Glass Company, a corporation.

CLARENCE G. MORSE and
TRUMAN R. YOUNG,
Robert Dollar Building,
San Francisco
PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco
Of Counsel.

Memorandum of Points and Authorities

Rule 62-(g) of the Rules of Civil Procedure;

Janssen v. Belding-Corticelli (3d C. C. A.), 79 F. (2d) 828;

G. M. Foster, individually, et seq., et al., Appellants, v. United States of America, Appellee, No. 9287 (9th C. C. A.). Order dated September 20, 1939;

In re Cudahy Packing Co. of Chicago, Ill. (2d C. C. A.), 104 F. (2d) 658.

[Endorsed]: Filed Nov. 13, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, November 13, 1939.

Before: Denman, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

ORDER SUBMITTING MOTIONS AND CAUSES

Ordered motion of appellants for supersedeas pending appeals, motion of appellee to consolidate appeals, and oral motion of appellee to dismiss appeals, and causes on merits argued by Mr. Felix T. Smith, counsel for appellants, and by Mr. James V. Hayes, Special Assistant to the Attorney General, counsel for appellees, and submitted to the court for consideration and decision.

At a Stated Term, to wit: The October Term A. D. 1939, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the 27th day of November in the year of our Lord one thousand nine hundred and thirty-nine.

Present:

Honorable William Denman, Circuit Judge, Presiding,

Honorable Clifton Mathews, Circuit Judge,

Honorable William Healy, Circuit Judge.

No. 9362

EUGENE PALMUTH, Individually, etc., et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 9363

A. H. BRAWNER, Individually, etc., et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 9364

LLOYD N. COBBLEDICK, etc., et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER STAYING PROCEEDINGS ON SUBPOENAS DUCES TECUM.

Good cause therefor appearing, and by direction of the Court, It Is Ordered that the operation of the subpoena duces tecum involved in each of the appeals herein be, and each of said subpoenas duces tecum, hereby is stayed until the further order of this Court.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, November 28, 1939.

Before: Denman, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENTS.

By direction of the Court, Ordered that the typewritten opinion this day rendered by this court in above causes be forthwith filed by the clerk, and that a judgment be filed in each of said causes and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Causes—Nos. 9362, 9363, 9364.]

Appeals from the District Court of the United States for the Northern District of California, Southern Division.

OPINION

Before Denman, Mathews and Healy, Circuit Judges:

Mathews, Circuit Judge:

These appeals are from orders denying motions to quash subpoenas duces tecum issued out of the District Court of the United States for the Northern District of California. The subpoenas were issued on November 2, 1939, and were directed to (1) Eugene Palmuth, president of Crowe Glass Company, (2) A. H. Brawner, officer and director of W. P. Fuller & Company, and (3) Lloyd N. Cobbledick, vice-president of Cobbledick-Kibbe Glass Company. Thereby each of the persons named was commanded to appear before the court on November 10, 1939, to testify and give evidence before the grand jury, and to bring with him certain letters, telegrams, correspondence, memoranda and other communications exchanged by or passing between the company of which he was an officer and one Sam Goodman.

On November 8, 1939, motions to quash the subpoenas were filed by Palmuth and Crowe Glass Company, Brawner and W. P. Fuller & Company.

and Cobbledick and Cobbledick-Kibbe Glass Company, respectively. The motions were denied and notices of appeal were filed on November 9, 1939.

In each of these cases, appellants' brief states: "The jurisdiction of this Court exists by virtue of section 225(a), title 28, of the United States Code Annotated."[1] Section 225(a) provides that the circuit courts of appeals shall have appellate jurisdiction to review by appeal "final decisions" in the district courts in all cases save where a direct review of the decision may be had in the Supreme Court under §345 of title 28.[2] The orders here appealed from are not "final decisions," within the meaning of §225(a), and are not appealable.

The contrary holding, In re Cudahy Packing Co., 2 Cir., 104 F. 2d 658, is clearly erroneous. That holding finds no support in Perlman v. United States, 247 U. S. 7, or in Go-Bart Importing Co. v. United States, 282 U. S. 344. No subpoena was involved in either of those cases. In each of them, the appeal was from an order denying an application for the return of papers belonging to the applicant and alleged to have been wrongfully seized or impounded, and to enjoin the use thereof as evidence. Such an order is, in effect, a judgment or decree dismissing a suit or proceeding for the recovery of property.

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1. Judicial Code, §128(a), 52 Stat. 779.
2. Judicial Code, §238, 43 Stat. 938.

Between such an order and the orders here appealed from, there is no pertinent similarity. Appellants' papers have not been seized or impounded. Appellants have not brought or had occasion to bring any suit or proceeding to recover their papers. The denial of motions to quash the subpoenas was not a dismissal of any suit or proceeding. Appellants may, notwithstanding such denial, disregard the subpoenas and, if prosecuted for contempt, may again challenge their validity—thus, in effect, renewing the motions to quash—and, if convicted, may appeal. Upon such appeals, and not otherwise, the denial of the motions may be reviewed by this court.

Even where, after indictment and before trial, the defendant in a criminal case applies for an order requiring Government counsel to return papers taken from the defendant without a warrant, and for the suppression of evidence obtained therefrom, an order denying the application is not a final decision and, therefore, is not independently appealable, but is reviewable only upon appeal from a judgment of conviction. Cogen v. United States, 278 U. S. 221.

We have no reason to suppose that the Supreme Court would have ruled differently if, instead of a seizure of Cogen's papers, there had been a subpoena requiring him to produce them, and a motion by Cogen to quash the subpoena had been denied; or if, as in the cases at bar, such subpoena had been

issued in an inquisitorial proceeding before a grand jury. If an appeal were permissible in either case, the practical consequences with respect to the orderly administration of justice would be equally disastrous; and in determining whether these orders are final, in the sense in which that term is used in the governing statute, practical considerations, such as the existence of other available methods of review, and the delays attendant upon permitting direct appeals to be taken, should not be ignored.

Appeals dismissed.

[Endorsed]: Filed November 28, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9362.

EUGENE PALMUTH, individually and as president of Crowe Glass Company, a corporation, and CROWE GLASS COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and upon motion of appellants for supersedeas pending appeal, motion of appellee to consolidate appeals, and oral motion of appellee to dismiss appeal, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the appeal in this Cause be, and hereby is dismissed.

[Endorsed]: Filed and entered Nov. 28, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-six (66) pages, numbered from and including 1 to and including 66, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 30th day of November, A. D. 1939.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 18, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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DEC 6 1939
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 571

LLOYD N. COBBLEDICK, INDIVIDUALLY AND AS VICE-PRESIDENT OF COBBLEDICK-KIBBE GLASS COMPANY, A CORPORATION, AND COBBLEDICK-KIBBE GLASS COMPANY, A CORPORATION,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

No. 572

A. H. BRAWNER, INDIVIDUALLY AND AS OFFICER AND DIRECTOR OF W. P. FULLER & CO., A CORPORATION, AND W. P. FULLER & CO., A CORPORATION,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

No. 573

EUGENE PALMUTH, INDIVIDUALLY AND AS PRESIDENT OF CROWE GLASS COMPANY, A CORPORATION, AND CROWE GLASS COMPANY, A CORPORATION,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FELIX T. SMITH,
CHALMERS G. GRAHAM,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioners respectfully pray that writs of certiorari issue to review the judgments of the

United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled causes (R. 66), affirming the order (R. 33) of the District Court of the United States for the Northern District of California.

Introductory Statement

These three cases present identical questions; they were disposed of by the District Court in one ruling, and by the Circuit Court of Appeals in one opinion. The three records, page for page, are identical except for the difference in the names of the parties. Each record reference herein given therefore, refers to all three records.

Opinions Below

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 62) is not yet reported.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered November 28, 1939 (R. 66). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

Question Presented

The question presented is whether an order denying a motion to quash a subpoena *duces tecum* commanding a witness to appear and to produce papers in an inquisitorial proceeding before a grand jury is a final decision within the meaning of Section 128(a) of the Judicial Code.

Statute Involved

Section 128(a), Judicial Code (28 U. S. C. 225(a)):

> "The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions——

"First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

Statement of the Case

On November 2, 1939, a subpoena *duces tecum* was issued out of the District Court of the United States for the Northern District of California to each of the individual petitioners (R. 5). Each subpoena commanded the person named therein to produce certain papers before the Federal grand jury which was making an inquiry in said district into alleged violations of the anti-trust laws. Petitioners filed motions to quash the subpoenas on the grounds that the subpoenas were oppressive, unreasonable, and invalid, and in violation of petitioners' constitutional rights (R. 10). The District Court, after hearing, denied the motions; and separate appeals were taken to the Circuit Court of Appeals (R. 43). That court dismissed the appeals on the ground that the order appealed from in each case was not a "final decision" within the meaning of Section 128(a) of the Judicial Code (R. 62, 66).

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In holding that the order of the District Court is not a final decision within the meaning of Section 128(a) of the Judicial Code.

2. In dismissing the appeals from the order of the District Court.

Reasons for Granting the Petition

1. The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *In re Cudahy Packing Co.* (1939)

104 F. (2d) 658. The Court below admitted the conflict and expressly disapproved the *Cudahy* case, saying (R. 63):

> "The contrary holding, *In re Cudahy Packing Co.*, 2 Cir., 104 F. 2d 658, is clearly erroneous."

2. The decision of the Circuit Court of Appeals is erroneous and is inconsistent with prior decisions of this Court. The decisions of this Court establish that the test for determining whether an order denying a motion to quash a subpoena or to secure or to suppress evidence is appealable, is whether the order is merely interlocutory *in a pending case* or whether it terminates an *independent proceeding*. The same decisions establish that the order of the District Court in the case at bar is of the latter kind.

Go-Bart Co. v. *United States* (1931) 282 U. S. 344,356;
Cogen v. *United States* (1929) 278 U. S. 221;
Perlman v. *United States* (1918) 247 U. S. 7, 12-13;
Ellis v. *Interstate Commerce Commission* (1915) 237 U. S. 434, 442;
Janssen v. *Belding-Corticelli* (1936) 84 F. (2d) 577.

No indictment has been found or returned against petitioners. There is no other pending proceeding to which the proceeding in the case at bar "can be an incident or appendage" (*In re Cudahy Packing Co., supra*, p. 659). As this Court pointed out in *Perlman* v. *United States, supra*, p. 13, an order cannot be "interlocutory in a proceeding not yet brought and depending upon it to be brought."

The court below relied upon *Cogen* v. *United States, supra*. In that case this Court held that an order denying a motion for an order requiring the return of papers taken from the defendant without a warrant, and for the suppression of all evidence obtained therefrom, was not

a final judgment. The decision, however, was based upon the fact that the motion was filed in a "criminal case after the indictment" (278 U. S., p. 227), and that "In essence, the motion resembles others made before or during a trial to secure or to suppress evidence," and did not deal "with a matter distinct from the general subject of the litigation," (278 U. S., p. 223). The Court expressly distinguished orders such as the one involved in the case at bar (278 U. S., p. 225):

> "Motions for the return of papers and the suppression of evidence made in the cause in advance of the trial * * * must be differentiated from independent proceedings brought for a similar purpose. * * * The independent character of the summary proceedings is clear, * * * wherever the motion is filed before there is any indictment or information against the movant, * * *."

Conclusion

It is respectfully submitted that the petition for writs of certiorari should be granted.

Dated, December 6th, 1939.

Respectfully submitted,

FELIX T. SMITH,
CHALMERS G. GRAHAM,
Attorneys for Petitioners.

FILE COPY

JAN 6 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 571

LLOYD N. COBBLEDICK, Individually and as Vice-President of Cobbledick-Kibbe Glass Company, a Corporation, and COBBLEDICK-KIBBE GLASS COMPANY, a Corporation,

Petitioners,

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A. H. BRAWNER, Individually and as Officer and Director of W. P. FULLER & Co., a Corporation, and W. P. FULLER & Co., a Corporation,

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No. 573

EUGENE PALMUTH, Individually and as President of CROWE GLASS COMPANY, a Corporation, and CROWE GLASS COMPANY, a Corporation,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITIONERS' BRIEF

DONALD R. RICHBERG,
FELIX T. SMITH,
CHALMERS G. GRAHAM,
Counsel for Petitioners.

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PETITIONERS' BRIEF

INTRODUCTORY STATEMENT

These three cases present identical questions; they were disposed of by the District Court in one ruling,

and by the Circuit Court of Appeals in one opinion. The three records, page for page, are identical except for the difference in the names of the parties. Each record reference herein given, therefore, refers to all three records.

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 62) is not yet reported.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered November 28, 1939 (R. 66). The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

STATEMENT OF THE CASE

On November 2, 1939, a subpoena duces tecum was issued out of the District Court of the United States for the Northern District of California to each of the individual petitioners (R. 5). Each subpoena commanded the person named therein to produce documents belonging to the corporations of which the individuals were officers before the Federal Grand Jury which was making an inquiry in said district into alleged violations of the antitrust laws. Petitioners, the individuals subpoenaed and the corporations of which they were officers, filed motions to quash the subpoenas on the grounds that the subpoenas were oppressive, unreasonable, and invalid, and in violation of petitioners' constitutional rights (R. 10). The District Court,

after hearing, denied the motions, and separate appeals were taken to the Circuit Court of Appeals (R. 43). That court dismissed the appeals on the ground that the order appealed from in each case was not a "final decision" within the meaning of section 128(a) of the Judicial Code (R. 62, 66). This Court granted certiorari because of conflict with the decision of the Circuit Court of Appeals for the Second Circuit.[1]

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the order of the District Court is not a final decision within the meaning of section 128(a) of the Judicial Code.

2. In dismissing the appeals from the order of the District Court.

SUMMARY OF ARGUMENT

I. Under the Judicial Code, all final decisions in the District Courts are appealable.

II. The decision of the District Court herein was final. It terminated an independent proceeding between the parties and left nothing for the District Court to do but to enforce it. It meets the tests of finality applied by the decisions of this Court and adopted without exception by the Circuit Courts of Appeals.

III. The decision of the District Court herein could not have been interlocutory. There was no pend-

[1] *In re Cudahy Packing Co. of Chicago, Ill.*, 104 F. (2d) 658.

ing proceeding in which it could have been interlocutory, and it could not be interlocutory in a criminal proceeding which might be brought in the future, or in contempt proceedings which might follow it. So far as the corporate petitioners are concerned, they could not be parties to a contempt proceeding, and on any theory the decision of the District Court denying their motions was necessarily final.

IV. The practical arguments suggested by the Ninth Circuit Court of Appeals, and more properly addressed to Congress than to a court, in fact emphasize the incorrectness of the conclusion reached by that Court.

ARGUMENT

I. Under the Judicial Code, all final decisions in the District Courts are Appealable.

Section 128(a) of the Judicial Code provides:

"The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

First. In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

II. The decision of the District Court herein was final. It terminated an independent proceeding between the parties and left nothing for the District Court to do but to enforce it. It meets the tests of finality

applied by the decisions of this Court and adopted without exception by the Circuit Courts of Appeals.

The controversy between the parties to this appeal was confined to the question whether certain evidence should be produced. The Court decided it should, and left nothing further in controversy between the parties. This was a final determination of a matter affecting the "parties to the particular controversy."[2]

This Court has stated repeatedly that a decree is final "when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined."[3]

The Ninth Circuit Court of Appeals, in its opinion (R, 64), indicated that the District Court's order was not final, as there might still remain contempt proceedings which could be brought if the appellants should "disregard the subpoenas." But any order of any court can be challenged by disregarding it, or by risking contempt proceedings, and an order is not for that reason less final.

Even if the Ninth Circuit Court of Appeals thought the appellants, by disregarding the subpoenas, could have renewed their objection in appealing from commitments for contempt (after their presentment by

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[2] *Brush Electric Co. v. Electric Imp. Co.* (1892), 51 Fed. 557, 561.

[3] *St. L., I. M. & S. R. R. Co.* v. *Southern Ex. Co.* (1883), 108 U. S. 24, 28;
Ex Parte Norton (1883), 108 U. S. 237, 242;
Winthrop Iron Co. v. *Meeker* (1883), 109 U. S. 180, 183;
Berman v. United States (1937), 302 U. S. 211, 212-213.

the grand jury to the court as contumacious witnesses, an order of court directing them to comply, their subsequent refusal to do so, and an order of court adjudging them in contempt and committing them),[*] the denial of appellants' motions to quash is nevertheless final. It is unnecessary to satisfy the statutory requirement of finality that the decision be *res adjudicata* of the question involved. In *Weston* v. *City Council of Charleston* (1829), 2 Pet. 448, this Court said (p. 464):

> "If it [the term final judgment] were applicable to those judgments and decrees only in which the right was finally decided, and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import, or than Congress could have intended. Judgments in action of ejectment, and decrees in Chancery, dismissing a bill, without prejudice, however deeply they might affect rights protected by the Constitution, laws or treaties of the United States, would not be subject to the revision of the Court. A prohibition might issue, restraining a collector from collecting duties, and this Court would not revise and correct the judgment. The word "final" must be

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[*] Contrast this suggestion of the Ninth Circuit with the rule that "errors must be corrected by appeal and not by disobedience."

Brougham v. *Oceanic Steam Navigation Co.* (1913), 205 Fed. 857, 860;

Brotherhood of Ry. and S. S. Clerks, etc. v. *Texas & N. O. R. Co.* (1928), 24 F. (2d) 426, 427;

Wise v. *Mills* (1911), 220 U. S. 549.

understood in the section under consideration, as applying to all judgments and decrees which determine the particular cause."

Contempt proceedings are only a means of inflicting punishment or enforcing obedience, and one of the means contemplated when it is said that an order is final when nothing remains to be done but to enforce it. A contempt proceeding, moreover, is no part of the proceeding between the original parties, but is a separate proceeding to which the Court is itself one of the parties.[5]

The decisions of this Court establish that the test for determining whether an order denying a motion to quash a subpoena or to withhold or withdraw evidence is appealable or unappealable, is whether the order terminates an *independent proceeding* or is merely interlocutory *in a pending case*.[6]

The Circuit Court of Appeals for the Ninth Circuit, differing with that for the Second Circuit,[7] undertook (R. 63) to distinguish several decisions of this court[8]

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[5] *Michaelson* v. *United States*, 266 U. S. 42, at 64.
Hayes v. *Fischer*, 102 U. S. 121 at 122.

[6] *Cogen* v. *United States* (1929), 278 U. S. 221;
Go-Bart Co. v. *United States* (1931), 282 U. S. 344;
Burdeau v. *McDowell* (1921), 256 U. S. 465;
Perlman v. *United States* (1918), 247 U. S. 7;
Ellis v. *Int. Com. Comm.* (1915), 237 U. S. 434;
Alexander v. *United States* (1906), 201 U. S. 117.

[7] *In re Cudahy Packing Co. of Chicago, Ill.* (1939), 104 F. (2d) 658.

[8] *Perlman* v. *United States* (1918), 247 U. S. 7;
Go-Bart Co. v. *United States* (1931), 282 U. S. 344.

from the cases at bar, on the ground that in each of the decisions of this court, the appeal was from an order denying an application for the *return* of papers, while in the cases at bar the appeal was from an order denying motions to quash subpoenas requiring *production* of papers.

This distinction is merely formal. In all the cases the issue is whether the government is to have the citizen's documents. It cannot matter whether the citizen instituted a proceeding for the recovery of property, or a proceeding to protect the possession of property he still held. In each case the thing in controversy was the right of the government to the possession and use of the citizen's documents. In each case the denial of the motion terminated the litigation on the merits. This Court has not intimated that it makes any difference what particular form a proceeding of this sort takes, but has, on the contrary, assimilated "applications to suppress a deposition * * * to compel the production of books or documents * * * for leave to make physical examination of a plaintiff, * * * or for a subpoena duces tecum."[*]

The nebulous character of the Ninth Circuit's attempted distinction can be readily demonstrated. Where the government seeks to secure under a subpoena duces tecum the possession of a citizen's documents, the Ninth Circuit Court says that the denial of the motion to quash is not final and appealable because the citizen can thereafter, disregard the subpoena, be committed for contempt, and then appeal from the commitment. Where the government official already has possession, however, and a motion for the return

[*] *Cogen* v. *United States* (1929), 278 U. S. 221, 223-224.

of the documents is granted, this Court holds that the order is appealable at once.[10] Yet it is clear that the government official, as well as the citizen, has it fully within his power to refuse to obey the order, be committed for contempt and then appeal from the commitment. The delivery of documents is the gist of the action in both cases, there is no essential difference in the proceedings, and the reasoning behind the cases holding that an order for the delivery of documents by the government official to the citizen is appealable, is equally applicable to the delivery of documents by the citizen to the government official. "At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor."[11]

Whether the order of a district judge on a motion to withhold or withdraw documents is a final order is not to be determined by whether the suit is for the recovery of property. The same rule governs the finality of an order in proceedings to recover property in the custody of the court as governs the finality of an order in pro-

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[10] *Burdeau* v. *McDowell* (1921), 256 U. S. 465.

[11] Brandeis and Holmes JJ dissenting on the merits in *Burdeau* v. *McDowell* (1921), 256 U. S. 465, 477. The United States comes into its own courts on the same footing, with regard to practice and procedure, as an ordinary litigant. *First Nat. Bank* v. *United States* (D. C., Mo. 1932), 2 F. Supp. 107, 108; *Kehoe* v. *Commissioner of Internal Revenue* (3d C.C.A., 1939), 105 F. (2d) 552, 556; *United States* v. *National City Bank of New York* (2d C.C.A., 1936), 83 F. (2d) 236, 238, certiorari denied, 299 U. S. 563.

ceedings to keep it from the court. If no other suit has yet been instituted, the order is final and appealable; if a suit is pending or an indictment has been returned, the order is merely interlocutory.

This distinction is indicated by *Cogen v. United States, supra.* Cogen's papers had been obtained from him illegally. When he applied for an order for their return, *an indictment had already been found.* The order denying his application was therefore held to be interlocutory, and an appeal was refused. In other cases[12] involving exactly the same situation, except for the deciding fact that no indictment had yet been returned, the applications for the recovery of the documents were held to be independent proceedings, and the orders thereon final and appealable. In another case,[13] it was the United States attorney who appealed from an order for the return of certain documents to a prospective defendant. The order was held final and appealable because no indictment had yet been returned to which it could be interlocutory.

Perlman v. *United States*, supra, was cited by the Ninth Circuit Court of Appeals as involving an appeal "from an order denying an application for the return of papers * * * and to enjoin the use thereof as evidence" (R. 63). An examination of the facts shows that such was not the case. Documents belonging to Perlman and produced at a former trial in which he had served as a witness were impounded in the custody of the clerk. The United States attorney obtained an order directing the clerk to produce the exhibits before

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[12] *Go-Bart Co.* v. *United States* (1931), 282 U. S. 344; *In re Milburne* (1935), 77 F. (2d) 310.

[13] *Burdeau* v. *McDowell* (1921), 256 U. S. 465.

the grand jury and give him access to them. Perlman thereupon petitioned the court to *restrain the government's attorney from using the documents.* So much of Perlman's petition as related to the recovery of the documents was withdrawn and never ruled upon. The petition amounted, in effect, to a "motion to quash" the order giving the United States attorney access to the exhibits. It is hard to see, therefore, how the Circuit Court of Appeals could have regarded the order denying this petition as "a judgment or decree dismissing a suit or proceeding for the recovery of property" (R. 63). The case was strictly analogous to our own, except that in our case the district court denied a motion to quash a *subpoena* giving the United States attorney access to documents. Both cases involved the government's access to documents.

The rule heretofore stated, that a proceeding upon a subpoena is an independent proceeding unless instituted in connection with another proceeding pending before the court, has been supported without exception, so far as we have been able to determine, by the decision of this Court and of the circuit courts of appeals.[14] And

[14] *Interstate Commerce Comm.* v. *Brimson* (1894), 154 U. S. 447;

Interstate Commerce Commission v. *Baird* (1904), 194 U. S. 25;

Janssen v. *Belding-Corticelli* (1936), 84 F. (2d) 577;

In re Cudahy Packing Co. of Chicago, Ill. (1939), 104 F. (2d) 658;

Ellis v. *Int. Com. Comm.* (1915), 237 U. S. 434. This case is closely analogous to the situation here. In both cases the question involved was whether the witness was legally required to respond to the subpoena. In these cases the question was raised by motions to quash; in the *Ellis* case by a petition to enforce compliance.

an order to produce, or an order quashing a subpoena, has always been held appealable when it was in itself the only controversy between the parties then before the court.[15]

An examination of the cases denying an appeal from an order to produce, or sustaining a subpoena duces tecum, shows that, without exception, the order was made in connection with a proceeding pending either before the court or before an examiner appointed by the court.[16]

The survey we have made of the decisions of United States courts compels the conclusion that the opinion of the Second Circuit Court of Appeals in *In re Cudahy Packing Co. of Chicago, Ill.*, supra, is an accurate statement of the law. It is consistent with every decision of this Court, and finds its only conflict in the present decision by the Circuit Court of Appeals for the Ninth Circuit.

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[15] *Ellis* v. *Int. Com. Comm.* (1915), 237 U. S. 434; *First National Bank of Mobile* v. *United States* (1925), 267 U. S. 576 (entertaining an appeal from 295 Fed. 142);
Brownson v. *United States* (1929), 32 F. (2d) 844;
Janssen v. *Belding-Corticelli* (1936), 84 F. (2d) 577;
In re South State Street Bldg. Corporation (1939), 105 F. (2d) 680;
Atlanta Enterprises v. *Crawford* (1927), 22 F. (2d) 834.

[16] *Alexander* v. *United States* (1906), 201 U. S. 117;
Nelson v. *United States* (1906), 201 U. S. 92;
Coastwise Lumber & Supply Co. v. *United States* (1919), 259 Fed. 847;
Tucker v. *Peiler* (1924), 297 Fed. 570;
Goodyear Tire & Rubber Co. v. *Jamaica Truck Tire Serv. Co.* (1933), 66 F. (2d) 91;
Capital Co. v. *Fox* (1936), 85 F. (2d) 97.

III. The decision of the district court herein could not have been interlocutory. There was no pending proceeding in which it could have been interlocutory, and it could not be interlocutory in a criminal proceeding which might be brought in the future, or in contempt proceedings which might follow it. So far as the corporate petitioners are concerned, they could not be parties to a contempt proceeding, and on any theory the decision of the district court denying their motions was necessarily final.

If the decision of the district court was not final, it must have been because that decision was merely a part of some other proceeding, i. e., that the order was interlocutory. The question presents itself immediately; of what other proceeding was this order a part?

There was no pending proceeding in which it could have been interlocutory. This, as we have pointed out above, is the essential distinction between the instant cases and those in which this Court has held orders of this general type not appealable. For instance, in the *Cogen* case, an indictment was pending against petitioner at the time he made his motion. This Court characterized the petitioner's proceeding as "made in the cause in advance of the trial." On the other hand, in the *Go-Bart* and *Perlman* cases no information or indictment had been found, and this Court held the orders appealable. This is in accord with the *dictum* of this Court in the *Cogen* case. "The independent character of the summary proceedings is clear, * * * wherever the motion is filed before there is any indictment or information against the movant, like the motions in *Perlman* v. *United States*, 247 U. S. 7 and

Burdeau v. *McDowell*, 256 U. S. 465; * * *."[17] There is an essential difference between an order of this kind made in a pending case, in which a judgment will ultimately be rendered, on the appeal from which the error in the interlocutory order may be considered, and the orders in the instant cases and the *Go-Bart*, *Perlman* and *Cudahy* cases, where nothing else was to be done in the District Court, and where the denial of the motions effectually terminated all activities of the District Court. If those orders were not final decisions, then no final decisions were to be expected and no appeal could ever bring before an appellate court the error in these particular orders.

The decision of the district court could not have been interlocutory in a criminal proceeding which might be brought in the future. Such a contention was made in the *Perlman* case, supra, and was summarily disposed of by the court by the following paragraph (pp. 12-13):

> "The second contention of the government is somewhat strange, that is, that the order granted upon its solicitation was not final as to Perlman but interlocutory in a proceeding not yet brought and depending upon it to be brought. In other words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur."

We say the same thing here. An order cannot be interlocutory in a proceeding which may or may not be brought, and which at the time exists only in the

[17] *Cogen* v. *United States*, 278 U. S. 221, 225.

realm of possibility.[18] The fact that evidence obtained in one proceeding might be used to institute another does not in itself prevent the former from being independent.

The Ninth Circuit Court of Appeals seems to have felt that these denials of the motions to quash were in some way a part of contempt proceedings against the witness that might follow in the event they should disregard the subpoenas. The mere fact that in contempt proceedings the witnesses may renew their challenge to the subpoenas (R. 64) cannot make these particular orders unappealable, unless it can be urged that the motions to quash and the contempt proceedings were all one proceeding. Clearly, however, the motions to quash and the possible future contempt proceedings are quite independent. Motions to quash involve civil proceedings; contempt proceedings may be civil or criminal or both. Motions to quash involve issues as between the litigants; contempt proceedings involve issues as between a litigant and the court. Motions to quash are initiated by the filing of the motions themselves; contempt proceedings originate in the contempt itself, are not in existence at all before the contempt occurs, and could be instituted even though no motions to quash had ever been made. The natures of the respective proceedings are or may be different, the parties are different, the origins are different, the issues are different and the times when they arise are different. To contend that the two proceedings are not independent is to state an obvious fallacy.

In the instant cases, the individual witnesses are

[18] *Go-Bart Co.* v. *United States*, 282 U. S. 344, 356.

not the only petitioners. The corporations owning the documents intervened and joined in the motions to quash, in the appeals and in this petition. Since the subpoenas were not directed to these corporate petitioners, contempt proceedings against the corporations are out of the question. The only possible way in which the rights of these corporations could be asserted in the appellate court was by the appeals which the Circuit Court of Appeals dismissed. The corporations are in the precise situation heretofore noticed by this Court. "The independent character of the summary proceedings is clear, * * * whenever the application for the papers or other property is made by a stranger to the litigation, compare *Ex parte Tiffany*, 252 U. S. 32; *Savannah* v. *Jesup*, 106 U. S. 563; *Gumbel* v. *Pitkin*, 113 U. S. 545; * * *."[19] The corporations were not parties to the subpoenas and could not be parties to any contempt proceedings. Their motions, therefore, are quite independent of the possible future contempt proceedings. The orders denying these motions are final decisions and appealable as such.

IV. The practical arguments suggested by the Ninth Circuit Court of Appeals, and more properly addressed to Congress than to a court, in fact emphasize the incorrectness of the conclusion reached by that Court.

As practical considerations affecting the determination of the question, the Circuit Court of Appeals for the Ninth Circuit suggested two matters: "the existence of other available methods of review and the

[19] *Cogen* v. *United States*, 278 U. S. 221, 225; *Go-Bart Co.* v. *United States*, 282 U. S. 344, 356.

delays attendant upon permitting direct appeals to be taken * * *" (R. 65). If such practical considerations could have any weight, they should appeal to a Congress considering the amendment of the statute, rather than to a court concerned solely with its application. Under the statute, if the decision is a final decision, it is appealable. There is no doubt about what is and what is not a final decision. A decision, otherwise final, is none the less final because other available methods of review exist. On the contrary, the very finality of the decision tends to exclude other methods of review. *Ex parte Tiffany*, 252 U. S. 32, 37. In the instant case, certainly, no practical weight could be given to considerations of delay. The subpoenas were originally made returnable November 10 1939 (R. 6). The appeals were argued on the next business day, November 13th (R. 59). But all practical considerations about delay vanish when we consider the suggestion of the Circuit Court of Appeals that, instead of appealing from the denial of the motions to quash, appellants should have presented their points by awaiting contempt proceedings and appealing from convictions in such proceedings (R. 64). This method would not have expedited the presentation to an appellate court of the questions about the validity of the subpoenas. It simply would have delayed that presentation by the time necessary for the contempt proceedings. If practical considerations have any weight, therefore, they are all in favor of the very course adopted by appellants in this case, after they had been sanctioned by the Circuit Court of Appeals for the Second Circuit in the *Cudahy* case.

At the heart of the government's contention in these

cases is another practical matter worthy of consideration. In all cases, including those in which difficult and intricate questions of constitutional law are involved, if the government's contention is to prevail, the subpoenaed person must first be imprisoned or fined or both before he can raise his objections. The practical result in the conduct of its investigations is clear: the subpoenaed witness cannot risk the possibility of imprisonment and is thus effectively compelled to abandon any proceeding to assert his rights—the government has effectively suppressed any objection to its technique.

CONCLUSION

It is respectfully submitted that in these cases the decision of the Circuit Court of Appeals for the Ninth Circuit is erroneous and that the contrary decisions of the Circuit Courts of Appeals for the Second,[20] Third,[21] Seventh,[22] and Eighth [23] Circuits are correct. In these cases, therefore, the judgments should be reversed.

Respectfully submitted,

DONALD R. RICHBERG,
FELIX T. SMITH,
CHALMERS G. GRAHAM,
Counsel for Petitioners.

Dated: January 6, 1940.

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[20] *In re Cudahy Packing Co. of Chicago, Ill.* (1939), 104 F. (2d) 658;
In re Milburne (1935), 77 F. (2d) 310.

[21] *Janssen* v. *Belding-Corticelli* (1936), 84 F. (2d) 577;
Cassatt v. *Mitchell Coal & Coke Co.* (1907), 150 Fed. 32 (Reversed on other grounds, 207 U. S. 181).

[22] *In re South State Street Bldg. Corporation* (1939), 105 F. (2d) 680.

[23] *Brownson* v. *United States* (1929), 32 F. (2d) 844.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 571

LLOYD N. COBBLEDICK, Individually and as Vice-President of Cobbledick-Kibbe Glass Company, a Corporation, and COBBLEDICK-KIBBE GLASS COMPANY, a Corporation,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

No. 572

A. H. BRAWNER, Individually and as Officer and Director of W. P. FULLER & Co., a Corporation, and W. P. FULLER & Co., a Corporation,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

No. 573

EUGENE PALMUTH, Individually and as President of CROWE GLASS COMPANY, a Corporation, and CROWE GLASS COMPANY, a Corporation,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

REPLY BRIEF OF PETITIONERS

DONALD R. RICHBERG,
FELIX T. SMITH,
CHALMERS G. GRAHAM,
Counsel for Petitioners.

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EUGENE PALMUTH, Individually and as President of CROWE GLASS COMPANY, a Corporation, and CROWE GLASS COMPANY, a Corporation,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

REPLY BRIEF OF PETITIONERS

OPENING STATEMENT

The government brief presents a series of arguments intended to demonstrate that the final order from which

petitioners appealed *should not* be appealable. We submit that the only question here presented is whether the order of the District Court *is* a "final decision" within the meaning of Section 128 (a) of the Judicial Code. The arguments presented by the government to convince this Court that this particular kind of "final decision" should not be made appealable are arguments which can only be properly addressed to the Congress.

THE GOVERNMENT'S ARGUMENT

1. The Nature of the Proceedings in the District Court.

The government asserts that the motion of petitioners to quash the subpoenas did not begin an "independent proceeding" (which was then terminated by the denial of the motion by the District Court). The government contends that this motion to quash was an interlocutory step in a proceeding commenced by the *ex parte* application of the United States Attorney for the issuance of the subpoenas.

The fact is that the application for a subpoena is not the beginning of a legal proceeding. (*Perlman* v. *United States*, 247 U. S. 7, 12.) It is not an action against anyone or an action *in rem*. It is a process issued in aid of an investigation, which may be legislative, administrative or judicial. It may be issued in aid of judicial proceedings; but it has never been regarded as the beginning of a judicial proceeding. It is not a summons to answer a complaint. The witness is not made an adversary (the assumption being that he will not contest); and no judgment is sought against him.

An adversary proceeding that may result in a "final decision" *begins* when the motion is made to quash (exactly as such a proceeding begins with an applica-

tion for the return of records or for an injunction against their use). Such a proceeding *ends* with a final decision against or for the applicant. The order to produce records, or to return them, or to enjoin their use, is final and nothing remains except, in case of disobedience, to enforce it. For such enforcement execution is not appropriate, but the institution of a new contempt proceeding is available. But, when there is nothing left to be done in an adversary proceeding except to enforce "what has been determined" in the litigation, the decision which must be enforced by contempt proceedings is just as final as a decision which must be enforced by execution. (See *St. Louis etc. R. R. Co.* v. *Southern Express Co.*, 108 U. S. 24, cited in the government brief at p. 11.)

It is, therefore, contrary to well established law to argue that the application for subpoenas "began" a litigation between the government and the prospective witnesses. But what real difference would it make if we indulged the government in its assumption that the present proceeding "began" with an *ex parte* application for an order directing that subpoenas be issued, and that, when the petitioners moved to quash the subpoenas it became an adversary proceeding which was finally decided by the denial of their motion? The application of the United States Attorney for the issuance of subpoenas was not made as a part of any pending proceeding. If this "began" a proceeding, it was an independent proceeding against the petitioners; so it is hard to see how it makes any difference whether it be argued that the present proceeding "began" with the application for subpoenas or "began" with the motion to quash. The vital question here is: Has the proceeding reached a final decision from which an appeal can be taken?

2. Was the Order of the District Court Interlocutory?

It cannot be denied that upon a refusal to quash the subpoenas each became effective against petitioners as an order to produce documentary evidence. If this order were disobeyed, the petitioners could not assert that the Court had not heard and passed upon their objections to it. They could not offer any reason for non-compliance except the reasons which they had had an opportunity to present and had presented to the Court, and which the Court had held invalid. On refusing to obey the order of the Court, they would be simply contumacious.

Therefore, the order denying the motion to quash was certainly final as to them; nnd since they were the only parties to the proceeding it could not be held interlocutory—or comparable with an order against a witness entered in the course of a litigation, involving him or other persons. Such a litigation, obviously, would not be finally decided by such an order. The present proceeding, however, reached a final decision with the order denying the motion to quash; and the sole basis for the government's argument that the order was interlocutory is the contention that if it were disobeyed, the petitioners would be able to appeal from the inevitable sentence for contempt.

Would it be suggested that a decree in equity requiring specific performance would not be a final decision; but that in order to appeal, the defendant must refuse to obey, be held in contempt, and then appeal from the sentence for contempt?

We submit that, when it is conceded that an order can be reviewed only by disobeying it, suffering punishment and appealing from the order of punishment, it has been thereby conceded that the order was a final

decision. It is a well established principle that in a contempt proceeding, the issue is only whether a valid order of the court has been violated. Of course, the jurisdiction of the court to enter an order, the utter invalidity of the order, may be a defense. But such an appeal provides a much more limited review of the order than would be obtained upon an appeal from the order itself.

In *Brougham* v. *Oceanic Steam Navigation Company*, 205 Fed. 857, 860, it was held:

> "Errors must be corrected by appeal and not by disobedience. A person proceeded against for disobeying an injunction can never set up as a defense that the court erred in issuing it. He must go further and make out that in the law there was no injunction because the court had no right to adjudicate."
>
> (Citing *Elliott* v. *Peirsol*, 1 Pet. 328.)

A long line of cases cited in 13 C.J. 15 (note 27) demonstrates that only a limited and wholly inadequate review of the order of the District Court would be available on appeal from a judgment for contempt. The finality of the decision on the motion to quash is painfully apparent to petitioners. The prospect of a later appeal is only a mirage. It offers no real promise of an ultimate protection of their rights.

Furthermore, it is well established, as pointed out in our petition, that such a contempt proceeding is not a litigation between parties before the court, but is a separate proceeding in behalf of the court. (See 13 C.J. 56, 57.) It is difficult to see by what logic a final decision can be called "interlocutory" merely because

another proceeding can be or must be brought to enforce the decision.

This court has held (in approving an opinion of Judge Van Devanter) that when it is necessary "to punish or to coerce" witnesses into compliance—

> "that will give rise to *another case* or cases to which the witnesses will be parties on the one hand, and the government, as a sovereign vindicating the dignity and authority of one of its courts, will be a party on the other hand". (Italics ours.)
>
> *Alexander* v. *United States*, 201 U. S. 117, 122.

The government assumes that there is some "pending litigation" in which the order appealed from is merely interlocutory. (Government Brief, pp. 14, 17.) The fact is that there is no pending litigation. There is pending only an investigation by a grand jury, which may or may not result in a litigation; but which cannot by any stretch of language be called a "pending litigation". It is definitely in point to quote again the holding of this Court in *Perlman* v. *United States*, 247 U. S. 7, 12, as follows:

> "The second contention of the government is somewhat strange; that is that the order granted upon its solicitation was not final as to Perlman, but interlocutory in a proceeding not yet brought and depending upon it to be brought. In other words, that Perlman was powerless to avert the mischief of the order, but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur."

The government inadvertently, but seriously, misquotes the foregoing ruling when it says the court stated that Perlman was "powerless to resist" (Gov-

ernment Brief, p. 22). The court said "powerless to *avert the mischief* of the order", which is exactly the dilemma of the petitioners here. If petitioners were allowed only a limited appeal, purchased at the price of being punished for contempt, they would certainly be "powerless to avert" a great deal of mischief.

The government retreats from its own position as to the interlocutory character of the order when it urges (Government Brief, page 18) that, according to our argument, a recalcitrant witness might appeal from an order to testify and then "if unsuccessful, might continue to refuse and then appeal from an order adjudging him in contempt." This is a fanciful argument because a witness against whom a subpoena had been sustained on appeal, would hardly subject himself to a heavy penalty for a subsequent inexcusable contempt in order that he might prosecute a fruitless appeal. However, the mere fact that another appeal may be possible later in another proceeding does not detract from the finality of a decision. The government is simply arguing that there should not be an appeal from one final decision because there *may be* another final decision in another proceeding through which petitioners *could seek* a belated and partial review of the final decision in the first proceeding.

In this connection we should again point out that in an appeal from a contempt adjudication the defendant could not obtain a complete review of the order which he disobeyed. That order, even though so erroneous as to warrant a reversal on direct appeal, would be held sufficient to support a sentence for contempt unless it could be shown that the order was absolutely invalid, because, for example, the court lacked jurisdiction. Thus, the argument of the government, that the decision here involved is not final because the issues "could

all be disposed of on the appeal from the final order adjudging the witness in contempt" (Government Brief, p. 18)—is insupportable. The defendants would not be permitted to raise all the issues on appeal from a contempt order that they would have a right to raise on appeal from the original order which *finally* disposed of these issues. (See authorities cited supra, p. 5.)

Furthermore, the individual officers, as defendants to contempt proceedings, being only custodians of the records, could not assert all the rights of the owner of the records, the corporation, under the doctrine approved most recently in *Zimmerman* v. *Wilson*, 105 F. (2nd), 583, where the opinion of the Court by Judge Biddle (the present Solicitor General) points out (P. 586) that "the owner alone can object and invoke the protection of the (Fourth) Amendment".

3. The Decisions Cited Support Petitioners.

The decisions cited by petitioners clearly support the decision of the Circuit Court of Appeals for the Second Circuit in *In re Cudahy Packing Company*, 104 F. (2d) 658, which is in direct conflict with the decision in the case at bar, as the government concedes. It is unnecessary to reargue the pertinence and logic of the cases cited.

4. The Corporate Appeals.

The government argues that the decision against the corporate petitioners is not final, although admitting that "no contempt proceedings could be prosecuted against the corporations as such because no subpoenas were ever issued to the corporations". (Government Brief, page 25.) The argument is made that "the corporate interests will be adequately protected when an

application is made to have the individual officers adjudged in contempt".

This argument is easily demonstrated to be wholly unsound. The object of the subpoenas is to obtain corporate records. The decision of the District Court denies to the corporations any right to withhold these records with a finality as to the corporations which is not disputed. (*Go-Bart Imp. Co.* v. *U. S.*, 282 U. S. 344, 357.) If contempt proceedings are brought against the individual officers, they cannot protect the corporate rights or obtain a review of the decision except by assuming the personal risk of a sentence for contempt. Why should they do this? It can be assumed that they have no personal interest to warrant subjecting themselves to contempt proceedings. It can be assumed they may decline to be contumacious. Then the corporations are denied any right to review a decision admittedly final against them.

Let us take a case where A has in custody records belonging to B in which A has no interest. B moves to quash the subpoenas issued against A. Perhaps A joins, or he may simply await the outcome of B's motion. B's motion is denied. Yet the government claims that B cannot protect his records except by inducing A to subject himself to contempt proceedings. Obviously, B has been denied a review of a final decision directly depriving him of his rights in respect to the records in question.

We submit that the government's effort to deny the clear right of the corporations to appeal from the final decision against them is wholly without merit. The government, by its attack on the "corporate fiction" is, in fact, seeking to destroy corporate rights, that is, the composite rights of the stockholders. These rights, according to the government's contention, can only be

asserted if corporate officers are willing to subject themselves to personal punishment in order to prosecute a limited appeal in behalf of the corporation which is denied the right of any appeal.

The final statement of the government (p. 26) that the corporations have no "legal standing to protest against the subpoenas which were not addressed to them", must be an inadvertent error. Certainly a corporation as a legal entity has rights and interests separate from those of its officers. This is made clear in the pertinent cases of *Webster Coal and C. Co.* v. *Cassatt*, 207 U. S. 181, 186, and *Zimmerman* v. *Wilson*, supra. This is peculiarly evident here where it is contended that an individual officer must risk personal punishment in order to preserve the right of the corporation to appeal. The precedents are clear that a person not subpoenaed can sue or intervene to prevent his records from being taken from another person. (*Newfield* v. *Ryan*, 91 F. (2nd) 700, 701). Such a litigant, whether an individual or a corporation, is not a "volunteer" but asserts the rights of the real party in interest. He has a "legal standing" even though subpoenas are not addressed to him. *Perlman* v. *United States*, supra, provides an example of such a suit.

It is respectfully submitted that the judgments in these cases should be reversed.

Respectfully submitted,

DONALD R. RICHBERG,
FELIX T. SMITH,
CHALMERS G. GRAHAM,
Counsel for Petitioners.

Dated January 27, 1940.

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Nos. 571, 572, 573

In the Supreme Court of the United States

OCTOBER TERM, 1939

LLOYD N. COBBLEDICK, INDIVIDUALLY AND AS VICE PRESIDENT OF COBBLEDICK-KIBBE GLASS COMPANY, A CORPORATION, AND COBBLEDICK-KIBBE GLASS COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

A. H. BRAWNER, INDIVIDUALLY, AND AS OFFICER AND DIRECTOR OF W. P. FULLER & CO., A CORPORATION, AND W. P. FULLER & CO., A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

EUGENE PALMUTH, INDIVIDUALLY, AND AS PRESIDENT OF CROWE GLASS COMPANY, A CORPORATION, AND CROWE GLASS COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION BY THE UNITED STATES TO ADVANCE

In the Supreme Court of the United States

OCTOBER TERM, 1939

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LLOYD N. COBBLEDICK, INDIVIDUALLY AND AS VICE PRESIDENT OF COBBLEDICK-KIBBE GLASS COMPANY, A CORPORATION, AND COBBLEDICK-KIBBE GLASS COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

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v.

UNITED STATES OF AMERICA

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EUGENE PALMUTH, INDIVIDUALLY, AND AS PRESIDENT OF CROWE GLASS COMPANY, A CORPORATION, AND CROWE GLASS COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION BY THE UNITED STATES TO ADVANCE

198424—39

The Solicitor General, pursuant to Rule 20, paragraph 3, of this Court, moves that the above entitled causes be advanced for hearing at the earliest date convenient to the Court if the writs of certiorari are granted.

The jurisdiction of this Court has been invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 347), to review a judgment of the Circuit Court of Appeals for the Ninth Circuit dismissing appeals from an order of a district court entered in the instant cases on the sole ground that the orders were not appealable under Section 128 (a) of the Judicial Code (U. S. C., Title 28, Sec. 225 (a)).

The order here involved denied motions to quash subpoenas *duces tecum* issued to each of the petitioners by a grand jury sitting in the Northern District of California. The subpoenas were issued on November 2, 1939 (R. 8), and the motions to quash were filed on November 7, 1939 (R. 10–13). On November 9, 1939, the District Court overruled the motions (R. 32–33) and on the same day petitioners gave notice of their intention to appeal (R. 43–44). On November 13, 1939, respondent orally moved the Court of Appeals to dismiss the appeals, and arguments of counsel were heard at that time (R. 59). The Court of Appeals, on November 28, 1939, filed its opinion and decree dismissing the appeals (R. 62–66). These cases were docketed in this Court on December 6, 1939.

The grand jury which issued the subpoenas has been in session since July and is now sitting. The documen-

tary evidence sought is required in order that the grand jury may continue with and complete its deliberations.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

Counsel for petitioners concur in the above motion to advance.

FELIX T. SMITH,
CHALMERS G. GRAHAM,
Counsel for Petitioners.

DECEMBER 1939.

U. S. GOVERNMENT PRINTING OFFICE : 1939.

MEMORANDUM FOR THE U.S.

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CHARLES ELMORE CROPLEY

Nos. 571, 572, 573

In the Supreme Court of the United States

OCTOBER TERM, 1939

LLOYD N. COBBLEDICK, INDIVIDUALLY AND AS VICE PRESIDENT OF COBBLEDICK-KIBBE GLASS COMPANY, A CORPORATION, AND COBBLEDICK-KIBBE GLASS COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

A. H. BRAWNER, INDIVIDUALLY, AND AS OFFICER AND DIRECTOR OF W. P. FULLER & CO., A CORPORATION, AND W. P. FULLER & CO., A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

EUGENE PALMUTH, INDIVIDUALLY, AND AS PRESIDENT OF CROWE GLASS COMPANY, A CORPORATION, AND CROWE GLASS COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM ON BEHALF OF THE UNITED STATES

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No. 572

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v.

UNITED STATES OF AMERICA

No. 573

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MEMORANDUM ON BEHALF OF THE UNITED STATES

196423—39

The petition for writs of certiorari in the above-entitled cases presents the single question of whether an order denying a motion to quash a subpoena *duces tecum* commanding a person to appear and produce documents before a grand jury is a final decision from which an appeal may be taken pursuant to Section 128 (a) of the Judicial Code (U. S. C., Title 28, Sec. 225 (a)). This question was answered in the negative by the Circuit Court of Appeals for the Ninth Circuit in a single decision dismissing the appeal in each of the present cases (R. 62). That decision is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *In re Cudahy Packing Co. of Chicago, Ill.*, 104 F. (2d) 658.

It is our view that the decision in the *Cudahy* case is erroneous and that the decision in the instant cases is correct. However, the conflict between the circuit courts of appeals creates confusion on a question of substantial public importance in the administration of justice, and the United States does not oppose issuance of the writs.

For the reasons therein explained, the United States is submitting herewith a motion to advance the cases for argument if the writs of certiorari are granted.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

DECEMBER 1939.

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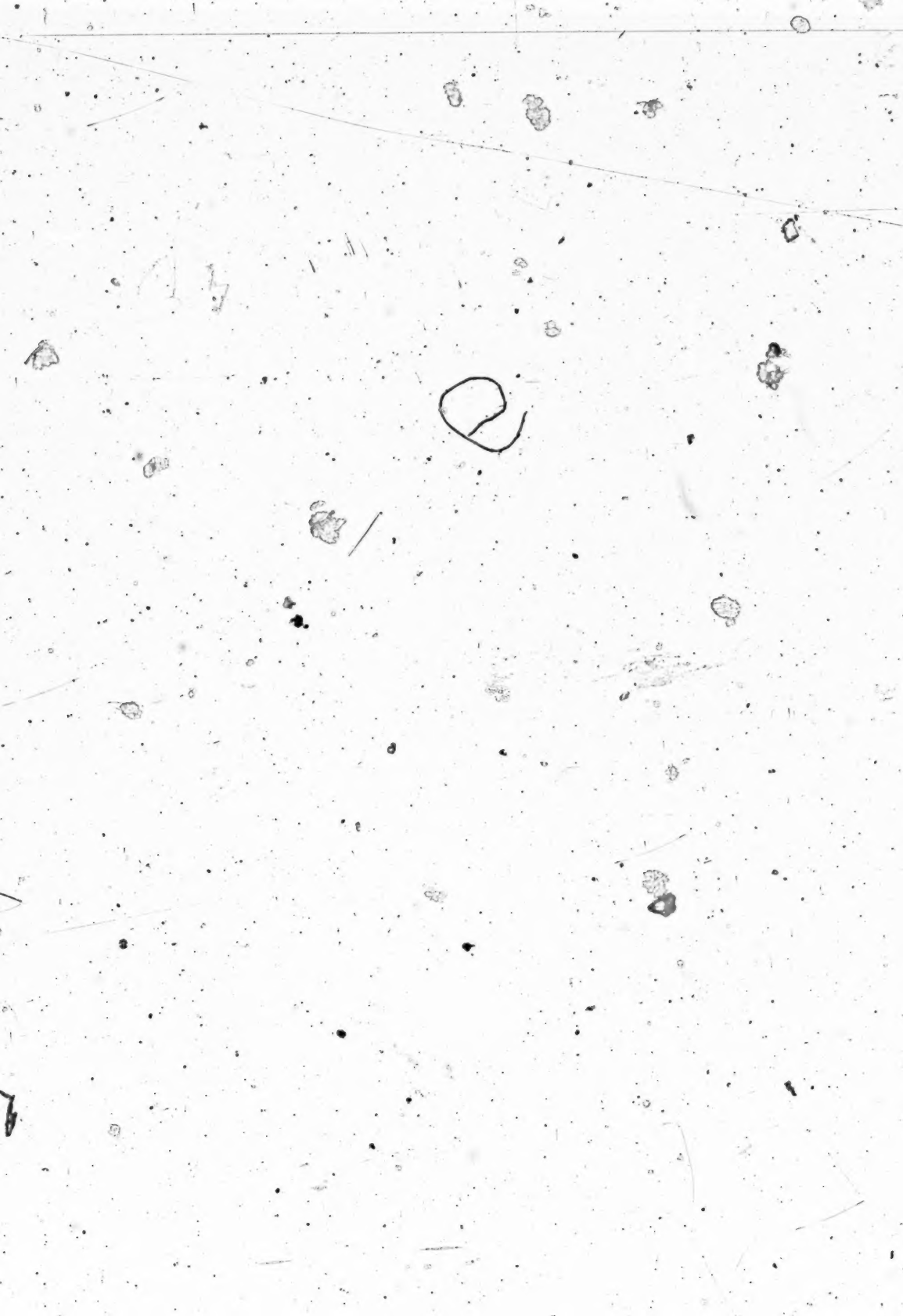

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Nos. 571, 572 and 573

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UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals in these cases (R. 62) has not yet been reported.[1]

JURISDICTION

The judgment of the Circuit Court of Appeals in each of these cases was entered on November 28, 1939 (R. 66). Petitions for writs of certiorari were granted by this Court on December 18, 1939. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an order denying a motion to quash a subpoena *duces tecum* commanding a witness to appear and to produce papers in an inquisitorial proceeding before a grand jury is a final decision within the meaning of Section 128 (a) of the Judicial Code.

STATUTE INVOLVED

Section 128 of the Judicial Code (U. S. C., Title 28, Section 225) provides in part as follows:

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[1] The Circuit Court of Appeals rendered a single opinion for all three cases. They were disposed of at the same time both in the District Court and the Circuit Court of Appeals and have, for practical purposes, been treated as one case. The paging and content of each of the three separate printed records are almost identical and the record references throughout this brief refer to all three records.

(a) *Review of final decisions.*—The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—

First. In the district courts, in all cases save where a direct review of the decisions may be had in the Supreme Court under section 345 of this title.

STATEMENT

On November 2, 1939, the United States Attorney for the Northern District of California presented a petition to the District Court for an order directing the issuance of subpoenas *duces tecum* directed to Lloyd N. Cobbledick, vice president of the Cobbledick-Kibbe Glass Company, Eugene Palmuth, president of the Crowe Glass Company, and A. H. Brawner, "officer and director" of W. P. Fuller & Co. (R. 2). The petition sought the appearance of the above parties[2] and the production of certain books, records, and documents before a grand jury sitting in the Northern District of California, Southern Division.

On November 2, 1939, pursuant to an order entered upon the petition (R. 3), a subpoena *duces tecum* was issued, directed to, and served upon each of the individuals named (R. 5–8). The subpoena

[2] In addition to these individuals, the petition sought the issuance of a subpoena directed to A. E. Schwartz. It does not appear that Mr. Schwartz filed a motion to quash and, in any event, he is not a party to these proceedings.

was returnable November 10, 1939 (R. 6). Thereupon, Cobbledick, Palmuth, and Brawner each moved individually and as an officer of his respective corporation, and jointly and severally with such corporation, for an order quashing and vacating the subpoena and quashing and vacating the paragraph in the subpoena requiring production of the documents (R. 10–13). At the time these petitions were filed there was no indictment nor information pending against any of the individuals subpoenaed nor against any of the corporations of which they were, respectively, officers.

The grounds upon which each of these motions was based are set forth in the record (R. 11–12). They may be summarized as follows:

That the subpoenas called for testimonial, as distinguished from written, evidence; that the enforcement of the subpoenas would require the witnesses to testify against themselves, in violation of the Fifth Amendment; that the subpoenas required the witnesses to determine which papers in their files were called for; that there was no showing of the materiality of the evidence called for to matters within the grand jury's jurisdiction; that enforcement of the subpoenas would amount to an unlawful search and seizure, in violation of the Fourth Amendment, and a deprivation of property, in violation of the Fifth Amendment.

On November 9, 1939, the District Court denied the motions to quash (R. 32–33). Thereupon, each

of the moving parties filed notices of appeal to the Circuit Court of Appeals for the Ninth Circuit (R. 43–44). On application for a stay pending appeal (R. 57), the Circuit Court of Appeals entered an order on November 27, 1939, staying the operation of the subpoenas *duces tecum* until further order of the court (R. 61). The cases were heard in the Circuit Court of Appeals upon the oral motion of the appellee to dismiss the appeals (R. 66). On November 28, 1939, that court entered judgment dismissing the appeal in each case (R. 66) on the ground, as stated in the opinion (R. 62–65), that the order was not final and therefore was not appealable under Section 128 (a) of the Judicial Code (U. S. C., Title 28, Section 225 (a)).

SUMMARY OF ARGUMENT

The order of the District Court denying the motions to quash the grand jury subpoenas was not a "final decision" within the meaning of Section 128 (a) of the Judicial Code. Petitioners erroneously insist that the motions to quash constituted an independent proceeding which was terminated by order denying the motions. In fact, the motions to quash were an intermediate step in a proceeding commenced for the purpose of securing evidence for use in a grand jury investigation. That proceeding commenced with the issuance of the subpoenas and is not ended until the court compels the production of the evidence through the use of its power to commit for contempt.

The applicable decisions of this Court demonstrate that a decision is not final for purposes of appeal unless it effectively terminates the rights of the parties to litigate the questions before the court making the decision. The present order does not meet that test because the same issues would be open if, after an unsuccessful appeal, the witnesses continued in their refusal to comply with the subpoenas and it became necessary to apply to the court for enforcement by contempt. Furthermore, an appeal at this stage of the proceedings would bring up issues which could all be disposed of on an appeal from a subsequent judgment in contempt. Petitioners' argument that the order is final as to the corporate petitioners is without merit because the corporations were not subpoenaed and therefore have no standing separate and distinct from the individuals who were subpoenaed.

ARGUMENT

THE ORDER OF THE DISTRICT COURT IS NOT A FINAL DECISION WITHIN THE MEANING OF SECTION 128 (a) OF THE JUDICIAL CODE AND HENCE IS NOT APPEALABLE

The pivotal issue in these cases is whether petitioners who were witnesses served with subpoenas *duces tecum* requiring them to produce documentary evidence before a grand jury, may appeal to the Circuit Court of Appeals from an order of the District Court denying their respective motions to quash the subpoenas. Both parties agree that

the answer to that question depends upon whether the decision is a final decision within the meaning of Section 128 (a) of the Judicial Code which gives the circuit courts of appeals "appellate jurisdiction to review by appeal final decisions" by district courts in all cases except as otherwise specified. Petitioners contend that the denial by the District Court of the motions to quash the subpoenas must be considered as a final decision within the meaning of the statute. We submit that petitioners' argument is premised on an erroneous theory as to the nature of the proceedings in the District Court. In our view a proper consideration of the scope of that proceeding plainly demonstrates that the order denying the motions to quash was interlocutory in character and hence not reviewable under the applicable decisions of this Court.

1. *The nature of the proceedings in the District Court*

Stated in its simplest form, petitioners' argument appears to be that since there was no other proceeding pending in the District Court, the motions to quash the subpoenas were an independent proceeding and therefore the denial of the motions to quash finally decided that independent proceeding. To support this proposition petitioners have cited numerous cases—most of which relate to proceedings brought to recover evidence alleged to have been wrongfully seized—which superficially appear to lend some color to their claim. As we

shall subsequently point out in our analysis of the cases, those decisions deal with situations in which the orders of the district courts forever ended the complaining parties' rights to litigate in those courts the questions involved in the proceedings. In the cases at bar, on the other hand, the denial of the motions to quash did not end petitioners' rights to challenge the subpoenas in the District Court, nor did it in any way change the rights, duties, and obligations of petitioners. The subpoenas remain outstanding but the documents remain in petioners' possession. No further order has been entered against petitioners and they may, if they choose, stand on the asserted invalidity of the subpoenas. If the court is subsequently called upon to compel obedience to the subpoenas, petitioners are free to contest the validity of the subpoenas on whatever ground they desire to urge. In other words, the refusal to quash the subpoenas did not end the petitioners' rights to litigate in the District Court the questions raised by their motions.

The basic fallacy in petitioners' argument is that they endeavor to dispose of the issue by merely denominating their attempt to quash the subpoenas as an "independent proceeding." Their only effort to support this position is an argument to the effect that there was no indictment, information, or contempt proceeding then pending in which the order denying the motion could have been interlocutory. But petitioners err in their fundamental

assumption that no proceeding of any kind was pending prior to filing their motions to quash; they unwarrantedly assume that pendency of a prior proceeding depends in these cases upon whether an indictment has been returned, information filed, or contempt proceeding initiated.

If it is pertinent to spell out the existence of a proceeding in which the present order was merely an interlocutory step, it is not difficult to do so. The proceeding was commenced by the *ex parte* application of the United States Attorney for the issuance of the subpoenas (R. 2); the order of the court directing that subpoenas be issued (R. 3); and the service of the subpoenas on the individual petitioners (R. 8). It was those steps which started a proceeding to compel the production of certain evidence before the grand jury. If any contest were to develop, it could be finally decided only by an order which specifically compelled the production of the evidence or permanently denied the right to secure the evidence.

When petitioners interposed in this situation a motion to quash the subpoenas, they did not commence an independent proceeding because the motions were directed to the outstanding subpoenas and were dependent on their existence. The motions to quash served the purpose of presenting to the court the objections which could be raised in defense to an application for an order enforcing the subpoenas; without petitioners subjecting them-

selves to the risk of such an order being entered. In a sense, the motions were analogous to demurrers or motions to dismiss, and after the court overruled them petitioners were neither under greater compulsion than they had been prior to filing the motions nor had they lost the right to have the District Court pass upon their contentions before entering an order compelling the production of evidence. It is significant that petitioners themselves suggest no rights lost to them by the denial of the motions to quash. All of their fears are grounded on the fact that they may not be able to prosecute an appeal before having to choose between compliance with the subpoenas and subjecting themselves to the risk of being adjudged in contempt.

2. *The instant order is interlocutory in character.*

In the past this Court has frequently had occasion to consider the meaning of the phrase "final decision" as it is used in statutes defining appellate jurisdiction.[7] Perhaps the clearest statement on the point is found in *St. Louis, I. M. & S. R. R. Co.*

[7] It is immaterial that in some instances the court was considering other statutes defining the scope of appellate jurisdiction. In *Ex parte Tiffany*, 252 U. S. 32, 36, this Court had under consideration the appealability of an order under Section 128 of the Judicial Code, the section here involved. In regard to this section, the Court said:
"The words 'final decisions in the district courts' mean the same thing as 'final judgments and decrees' as used in former acts regulating appellate jurisdiction."

v. *Southern Express Co.*, 108 U. S. 24, 28, where the rule is stated as follows:

> * * * a decree is final, for the purposes of an appeal to this court, when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.

Obviously this test is not met by an order denying motions to quash. At this stage of the proceeding there is no order outstanding against petitioners which could be enforced by execution or otherwise. It is elementary that the subpoenas are not self-executing. The order denying the motions to quash those subpoenas did not change their character or place any further obligation on petitioners. The most that can be said of the court's action is that it indicated that when and if the occasion arose the court might enter an order which could be enforced by execution. All that petitioners now have to complain about is this preliminary indication of the view which the court might adopt if it became necessary for the grand jury to seek the aid of the court in obtaining the evidence.

Curiously enough this Court has never before passed upon precisely this situation. However, there are several decisions dealing with analogous situations which serve to demonstrate the interlocutory character of the instant order. Those cases arose as the result of the refusal of a witness who was not a party to a proceeding then pending

to testify or produce evidence. This Court has uniformly held that in such circumstances the witness could not appeal from the refusal of the court to relieve him of his obligation to testify or produce the evidence unless he had been adjudged in contempt for failure to do so.

The application of the rule is most forcefully demonstrated by the decision in *Alexander* v. *United States*, 201 U. S. 117. Alexander was a witness who had been served with a subpoena *duces tecum* requiring him to appear and produce documents before a special examiner appointed by the court to take evidence in regard to a particular issue raised in a civil suit which was then pending in the Circuit Court for the Eastern District of Wisconsin. Although Alexander was an officer of one of the corporate defendants, he was not a party to the civil suit and whatever rights he had to resist the subpoena were those of a stranger to the litigation. Upon his assertion of those rights and his refusal to answer questions or to produce the documents, the United States petitioned the Circuit Court for an order commanding him to do so. The court entered the order sought and from this ruling Alexander appealed to this Court. After consideration of the case it was held that the appeal should be dismissed for want of jurisdiction because the order of the Circuit Court was not a final decision. But the opinion clearly indicates that if Alexander had been adjudicated in contempt there

would then have been a final order from which an appeal could have been taken.

The rule followed in the *Alexander* case was again applied in *Webster Coal Co.* v. *Cassatt*, 207 U. S. 181. In that case a civil action had been brought by a shipper against the Pennsylvania Railroad pursuant to the Interstate Commerce Act. The plaintiff petitioned the Circuit Court for an order directing Cassatt and other officers of the Railroad Company, none of whom was a party to the pending litigation, to produce books and records in their possession. This petition was granted by the Circuit Court, but the Circuit Court of Appeals reversed. On certiorari this Court held that the action of the Circuit Court of Appeals was erroneous because the order was not final, and hence not reviewable. This holding was followed in *Pennsylvania Coal Co.* v. *Cassatt*, 207 U. S. 187. See also *Capital Company* v. *Fox*, 85 F. (2d) 97 (C. C. A. 2d); *Goodyear Tire & Rubber Co.* v. *Jamaica Truck Tire Service Co.*, 66 F. (2d) 91 (C. C. A. 7th).

We are unable to discover any substantial distinction which would justify refusal to apply the rule of the foregoing cases to the cases at bar. If the orders involved in those cases were not final, the order here is even more clearly interlocutory; for in the above cases the proceedings had been carried to a more advanced stage before the entry of the orders in question. In each of those cases the subpoena had been served, the witness had ap-

peared, and he was litigating the question of his right to refuse to answer certain questions or to produce certain documents. The order left a choice between only two courses: The witness might comply with the subpoena; or he might refuse, thereby incurring liability to punishment for contempt.

In the cases at bar, however, the witnesses had not appeared. Upon their appearance, pursuant to the subpoenas, they might still refuse to answer particular questions or to produce particular documents. In that event it would be necessary for the government to petition the court to direct them to answer, or for the grand jury to present them for contempt. Upon such a petition or presentment every question which the petitioners sought to raise by their motion in the District Court could be raised and passed upon again. We submit that if an order compelling the witness to answer and to produce documents pursuant to the subpoena is interlocutory, an order entered at a previous stage of the litigation refusing to quash the subpoena is, *a fortiori*, interlocutory.

Petitioners have attempted to distinguish the cases discussed above on the ground that in each of the cases the order involved was merely interlocutory in pending litigation. We think it apparent that the decisions do not rest on any such narrow or fictitious basis. Obviously, in each of the above cases the witnesses, by refusing to testify or to produce evidence, were asserting rights that were personal to them. They were not entitled to assert,

and did not assert, any rights which accrued to the litigating parties. So far as the witnesses were concerned, their rights were entirely separate from those of the litigating parties. The rights of the litigating parties might be affected by rulings upon the *admissibility* of evidence, and rulings of this character are interlocutory because the objections can be saved for hearing upon appeal from the final judgment on the ultimate issues of the case. But the personal rights of witnesses to refuse to testify or produce evidence are not involved on the appeal by the parties from final judgment. Any order directed to witnesses is entirely different in character from orders affecting the rights of litigating parties and has no connection with or dependence upon the rights of such parties.

An order such as was involved in the *Alexander* case, which does no more than command a witness to answer, escapes being final because it does not actually adjudge the witness in contempt for his insistence upon standing on his personal rights. The witness has another opportunity to urge his position in contempt proceedings. Hence, the order to testify or produce evidence is not final. The pendency of a legal proceeding *per se* does not make the order directed to the witness interlocutory because obviously the witness' rights cannot be urged upon appeal from a final judgment in the principal suit as can the rights of litigants.

Consequently, we submit that the pivotal consideration in determining the finality of orders directed to witnesses who are strangers to pending litigation must be whether the order effectively puts an end to the witness' opportunity to have his asserted rights passed upon by the court which enters the order. If the witness will have another opportunity in the lower court to assert his rights before there is any invasion of those rights, the order is not final and is not appealable.

Throughout their brief, petitioners' chief reliance is upon cases involving applications for the return of property allegedly wrongfully seized for use as evidence. If there were any merit in the argument that the mere pendency of a proceeding in and of itself determines the interlocutory character of an order, it seems apparent that the rule would be applicable to an order denying a stranger the right to have his property returned when it is being held for use as evidence in a proceeding between other parties. But it has been held that in such circumstances the order is final and the applicant may appeal regardless of the pending proceeding. *Go-Bart Co.* v. *United States*, 282 U. S. 344. So, here, even if there were no pending proceeding the order would yet not be final. The test is simply whether anything remains before enforcement of the order.

It is, of course, true that the existence of a pending proceeding raises strong practical objections to

allowing a witness to impede the administration of justice by appealing from the refusal of a court to sustain asserted rights not to give evidence. No doubt the desire of courts to prevent delays based on frivolous objections has had some influence upon decisions that witnesses must actually be adjudged in contempt before the order is final. However, those considerations are equally forceful in this case. A pending proceeding—the grand jury investigation—was in progress and the evidence was required for that proceeding. The rule which petitioners seek to have established would leave the door open for every witness who is subpoenaed to appear before a grand jury to obstruct the grand jury proceeding by appealing from an order involving the validity of the subpoena, which order had been entered on a motion made without danger of being adjudged in contempt of court. The ease with which such questions could be raised without incurring risk would certainly encourage obstructionist tactics.

This leads to another important practical consideration. A witness, of course, always has the right to appeal from the order punishing him for contempt. *Nelson* v. *United States*, 201 U. S. 92. See also *Union Tool Co.* v. *Wilson*, 259 U. S. 107; *Cogen* v. *United States*, 278 U. S. 221. Consequently, any rule which permitted an appeal from an order made prior to the entry of an order punishing a witness for contempt would leave the door

open for a witness to prosecute two appeals on identical issues. A recalcitrant witness might appeal from the first order requiring him to testify and if unsuccessful might continue to refuse and then appeal from an order adjudging him in contempt. As a result, there would be two appeals on issues which could all be disposed of on the appeal from the final order adjudging the witness in contempt. This would contravene the settled rule that cases are not reviewable in fragments and judgments are not appealable under the statute unless they are "not only final, but complete." *Moss* v. *Kansas City Life Ins. Co.*, 96 F. (2d) 108, 110.

Ordinarily the possibility of two appeals would appear to be more fancied than real. However, in the case of grand jury subpoenas it would offer an opportunity for witnesses effectively to obstruct justice and thus it becomes a very real danger. The life of a grand jury is limited to one term of court and may be extended only for two additional terms (U. S. C., Title 28, Section 421). It is conceivable that a recalcitrant witness bent on delay might be able to litigate the validity of his subpoena until the grand jury term expired and thus render moot the question of whether the evidence should be produced. Particularly is this true in districts such as the Southern District of New York where the terms of court are not over one month in length (U. S. C., Title 28, Section 452).

3. *The decisions relied upon do not support petitioners' contentions*

The principal cases relied upon by petitioners as supporting their argument that the instant order was a final order entered in an independent proceeding are *Perlman* v. *United States*, 247 U. S. 7; *Cogen* v. *United States*, 278 U. S. 221; and *Go-Bart Co.* v. *United States*, 282 U. S. 344. The same cases are the basis of the decision of the Circuit Court of Appeals for the Second Circuit in *In re Cudahy Packing Co.*, 104 F. (2d) 658, which is in direct conflict with the decision in the cases at bar upon substantially similar facts. These decisions all relate to the appealability of orders granting or denying applications for the return of documents or property alleged to have been wrongfully seized. In the *Cogen* case Mr. Justice Brandeis analyzed the decisions on the subject. That analysis may be summarized as follows: (a) Where the application is made before the commencement of any proceedings against the applicant, the order upon such application is final and appealable.[4] (b) Where the application is made after the commencement of proceedings by the filing of an indictment or information against the applicant, the order upon such application is not final. In such cases the right of review does not accrue until after a final judgment

[4] *Foley* v. *United States*, 64 F. (2d) 1 (C. C. A. 5th); *In re Milburne*, 77 F. (2d) 310 (C. C. A. 2d); *United States* v. *Poller*, 43 F. (2d) 911 (C. C. A. 2d).

on the indictment or information, to which the proceedings for the return of the documents are regarded as ancillary.[5] (c) Where the application is made after the filing of an indictment or information, but upon behalf of a person not charged in the indictment or information, the order is final and appealable.[6]

The general rule that follows from the foregoing analysis is that an appeal may be taken from an order granting or denying an application for the return of property or documents in all cases except where the applicant is a party to a pending proceeding to which the question of the custody of the property or documents is related. There is no conflict between this rule and our position in the instant cases. An application for an order compelling return of documents is the initial step in the judicial process and is in no way dependent on any prior judicial action. When the court passes upon the application it decides all questions relating to the custody and petitioners do not seriously contend that those issues could ever be presented to the court again.[7] In other words, the possibility of litigating

[5] *Coastwise Lumber and Supply Co.* v. *United States*, 259 Fed. 847 (C. C. A. 2d); *United States* v. *Broude*, 299 Fed. 332 (D. Minn.); *Jacobs* v. *United States*, 8 F. (2d) 981 (C. C. A. 9th); *United States* v. *Sheehan*, 57 F. (2d) 759 (W. D. N. Y.); *United States* v. *Marquette*, 270 Fed. 214 (C. C. A. 9th).

[6] *Go-Bart Co.* v. *United States*, 282 U. S. 344.

[7] Petitioners suggest in rather summary fashion that although the government can appeal from an order granting an application for the return of documents under the rule of *Burdeau* v. *McDowell*, 256 U. S. 465, it would still be

in that court the issues as to the custody of the documents is forever ended by the decision on the application. It is this fact that makes the decision final.

Petitioners, as well as the Circuit Court of Appeals for the Second Circuit, place particular stress on the decision in *Perlman* v. *United States*, 247 U. S. 7. In that case certain exhibits had been introduced and impounded by the court in connection with prior proceedings involving a patent infringement. The United States Attorney later obtained an order giving him access to these exhibits for use in connection with grand jury proceedings involving perjury charges against the petitioner, whose property the exhibits were. The petitioner, prior to the return of an indictment against him, sought to have the United States Attorney restrained and enjoined from taking possession of the exhibits. The District Court denied the petition and, upon appeal and error to the Supreme Court, the government moved to dismiss. The motion was denied by this Court. The fol-

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necessary to use contempt proceedings to compel a government officer to make delivery. Granting that that is true, it is beside the point because a government officer who refused to make delivery in obedience to a court order would have no standing in a contempt proceeding to question the correctness of the court's ruling in making the order. On the other hand, it is settled that a witness has standing to be heard on all questions relating to the validity of a subpoena at the time the court passes on the question of whether he should be adjudged in contempt. See *Graham* v. *United States*, 99 F. (2d) 746, 750 (C. C. A. 9th).

lowing statement is all that appears in the opinion on the question of the finality of the lower court's order (247 U. S. 7, 12–13):

> The second contention of the Government is somewhat strange, that is, that the order granted upon its solicitation was not final as to Perlman but interlocutory in a proceeding not yet brought and depending upon it to be brought. In other words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur.

From the foregoing quotation it is apparent that this court treated the case as raising the simple question of whether or not a person not involved in any pending proceeding could appeal from an order which placed in the hands of the United States Attorney documents which were in possession of the court. Obviously, the court was of the opinion that such a situation was no different from an application for the return of documents wrongfully seized, because it is expressly stated that the applicant was "powerless to resist." That in itself distinguishes the case from the instant cases because here the petitioners have the power to resist the subpoenas and to continue to refuse production of the evidence.

Petitioners seek to bring the holding in the *Perlman* case closed to the facts in the cases at bar

by emphasizing the fact that the order appealed from in the *Perlman* case denied a motion to vacate a previous order. In their brief (p. 11) they say that Perlman's "petition amounted, in effect, to a 'motion to quash' the order". It is difficult to perceive how this twisting of phraseology aids petitioners for it is clear that this Court was only concerned with the fact that an order had been entered which finally determined the custody of the documents and which could not be resisted. It is true, as petitioners point out, that both cases involve "the government's access to documents." But in the *Perlman* case the order gave that access without more; in the instant cases petitioners still have the control of the documents, and if they stand upon their rights further proceedings will be necessary to gain access.

The only decision of this Court other than those relating to applications for the return of property, which petitioners characterize as being closely analogous to the cases at bar is *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434. In that case proceedings were brought under Section 12 of the Interstate Commerce Act for an order directing a witness to answer certain questions, and to produce certain documents. The proceedings resulted in the entry of such an order, which was held to be appealable.[8] The determination that the

[8] It should be emphasized that the *Ellis* case was instituted pursuant to special statutory provisions authorizing the Interstate Commerce Commission to invoke the aid of

order was appealable was not placed on the ground that the proceeding was "independent," but upon the ground that the order was "the end of a proceeding begun against the witness" (p. 442). In other words, the order, like a contempt order for the enforcement of a subpoena, finally determined, insofar as the lower court was concerned, the obligations of the witness to testify and produce documents before the Commission. We submit that this decision clearly demonstrates the soundness of our contention that the test of finality is whether the order ends the opportunity for litigating the issue in the court which enters the order.

4. The appeals of the corporate petitioners were properly dismissed regardless of the finality of the order

Petitioners argue that on any theory of the case the order was final as to the corporate petitioners because no contempt proceeding could be prosecuted against the corporations. This argument is more

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the courts to compel the testimony of witnesses and the production of books, papers, and documents in proceedings before the Commission. Securing the attendance and testimony of witnesses and the production of books, papers, and documents was the sole purpose of the legal proceedings authorized by statute, and the order of the court directing Elfis to answer certain questions and produce certain documents was obviously the final judgment in the case and, therefore, was appealable.

ingenious than persuasive. Obviously no contempt proceedings could be prosecuted against the corporations as such because no subpoenas were ever issued to the corporations.[9] But the subpoenas were directed to the individuals who were the officers of the corporations. Those individuals are the persons charged with the duty of protecting the corporate interests. Any assertion of corporate rights would necessarily have to be made by an officer of the corporation because the officers are the means by which the corporate interests are protected. Petitioners do not even suggest that there are any rights which the corporate officers could assert in the name of the corporation but could not assert in their own names as individuals. Obviously, no such rights exist. In these circumstances it is apparent that the corporate interests will be adequately protected when an application is made to have the individual officers adjudged in contempt. Likewise, the corporate interests will be fully protected on the appeal from any final order adjudging the individuals in contempt. To argue that the instant order denying the motions to quash are final as to the corporations but not as to the individuals because the corporations cannot be parties to con-

[9] The subpoenas were not directed to the corporations or to the officers of the corporations generally. The subpoenas were addressed specifically to Cobbledick, Palmuth, and Brawner, respectively, as individuals (R. 5).

tempt proceedings, is to belabor the corporate fiction to the point of absurdity.

However, if petitioners insist upon regarding the corporations as raising issues separate and distinct from those raised by the individuals who were subpoenaed, they must accept the consequences of carrying the argument to its logical end. Assuming that the corporations are separate and distinct from the individuals, they have never been subpoenaed and are under no requirement to produce any documents. On this theory the only parties that are in any way affected by the subpoenas are the individuals who were served. It is their rights which are affected by the subpoenas and they are the only ones who have standing in court to assert those rights. Anyone else attempting to be heard in regard to the invasion of the rights of the persons subpoenaed would be a mere volunteer without standing to object to the court's ruling or appeal therefrom. If the corporate petitioners insist that they are in a different position from the individuals, their petitions plainly should be dismissed because the corporations, when considered as separate and distinct from the individuals, have never had legal standing to protest against the subpoenas which were not addressed to them.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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JANUARY, 1940.

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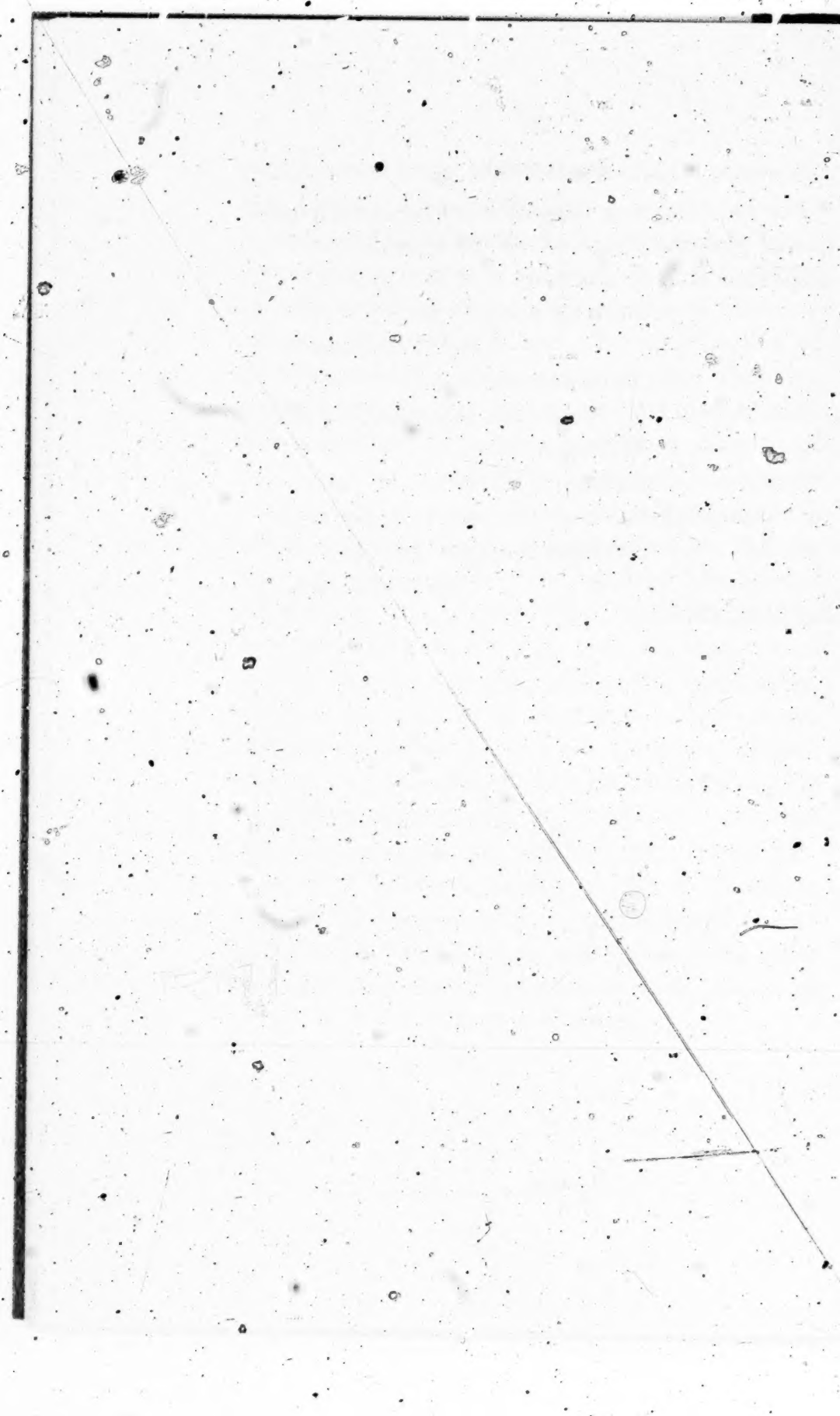

P. 1

SUPREME COURT OF THE UNITED STATES.

Nos. 571-572-573.—October Term, 1939.

Lloyd N. Cobbledick, Individually and as Vice President of Cobbledick-Kibbe Glass Co., a Corporation, and Cobbledick-Kibbe Glass Co., a Corporation, Petitioners,
571 vs.
United States of America.

A. H. Brawner, Individually and as Officer and Director of W. P. Fuller & Co., a Corporation, and W. P. Fuller & Co., a Corporation, Petitioners,
572 vs.
United States of America.

Eugene Palmuth, Individually and as President of Crowe Glass Co., a Corporation, and Crowe Glass Co., a Corporation, Petitioners,
573 vs.
United States of America.

On Writs of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

[February 26, 1940.]

Opinion of the Court by Mr. Justice Frankfurter announced by the Chief Justice.

~~Mr. Justice Frankfurter delivered the opinion of the Court.~~

The District Court for the Northern District of California denied motions to quash subpoenas *duces tecum* addressed to the petitioners and directing them to appear and produce documents before a United States grand jury at the July, 1939, term of that court. From the denial of these motions petitioners sought review by way of appeal to the Circuit Court of Appeals for the Ninth Circuit. That court found itself to be without jurisdiction and dismissed the appeals. We brought the cases here, 308 U. S. —, because of conflict between the decision below and that of the Circuit Court of Appeals for the Second Circuit, *In re Cudahy Packing Co.*, 104 F. (2d) 658. The matter in controversy—and the sole question raised in all three cases—vitally concerns the effective administration

of the federal criminal law. The question is whether an order denying a motion to quash a subpoena *duces tecum* directing a witness to appear before a grand jury is included within those "final decisions" in the district court which alone the circuit courts of appeal are authorized to review by § 128(a) of the Judicial Code (28 U. S. C. § 225).[1]

Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act[2] and has been departed from only when observance of it would practically defeat the right to any review at all.[3] Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. Not until 1889 was there review as of right in criminal cases.[4] An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial

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[1] Section 128(a) provides that, "The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions. . . ." Similar language was used in the Act of 1891, c. 517, 26 Stat. 828.

[2] §§ 21, 22, 25 of the Act of September 24, 1789, 1 Stat. 73, 83-85. For a discussion of the historical background, English and American, of the finality concept, see Crick, The Final Judgment as a Basis for Appeal, 41 Yale L. J. 539.

[3] See § 129 of the Judicial Code, 28 U. S. C. § 227, dealing with appeals from interlocutory injunctions, appeals from interlocutory decisions in receivership cases and from interlocutory decrees determining rights and liabilities in admiralty litigation.

[4] See United States v. More, 3 Cranch 159. Only by certificate of division of opinion in the circuit courts could review be obtained. See Curtis, Jurisdiction of the United States Courts, 82. By the Act of 1889 review as of right was allowed in capital cases. 25 Stat. 655, 656. For the history of federal criminal appeal see United States v. Sanges, 144 U. S. 310, 319-22.

court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal. *Cogen* v. *United States*, 278 U. S. 221.

In thus denying to the appellate courts the power to review rulings at *nisi prius*, generally, until after the entire controversy has been concluded, Congress has sought to achieve the effective conduct of litigation. For purposes of appellate procedure, finality—the idea underlying "final judgments and decrees" in the Judiciary Act of 1789 and now expressed by "final decisions" in § 128 of the Judicial Code—is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system. As an instrument of such policy the requirement of finality will be enforced not only against a party to the litigation but against a witness who is a stranger to the main proceeding. Neither a party nor a non-party witness will be allowed to take to the upper court a ruling where the result of review will be "to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation . . . ." Mr. Chief Justice Taft, in *Segurola* v. *United States*, 275 U. S. 106, 112. This is so despite the fact that a witness who is a stranger to the litigation could not be party to an appeal taken at the conclusion of the main cause. Such was the ruling in *Alexander* v. *United States*, 291 U. S. 117. In that case, witnesses were directed to appear and produce documents before a special examiner designated by the circuit court to hear testimony in a suit brought by the United States to enforce the Sherman Law. Upon refusal to submit the documents called for in the subpoena, the United States petitioned the circuit court for an order requiring compliance. The petition was granted, and appeals were then allowed to this Court. These appeals were dismissed for want of jurisdiction. The grounds of the decision are best indicated in the language of the opinion:

"In a certain sense finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving to him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go further and punish the witness for contempt of its order, then arrives a right of review, and this is adequate for his protection without unduly impeding the progress of the case . . .

This power to punish being exercised the matter becomes personal to the witness and a judgment as to him. Prior to that the proceedings are interlocutory in the original suit." 201 U. S. at 121-22.

We must now decide whether the situation of a witness summoned to produce documents before a grand jury is so different from that of the witness in the *Alexander* case that the sound considerations of policy controlling there should not govern here. The Constitution itself makes the grand jury a part of the judicial process. It must initiate prosecution for the most important federal crimes. It does so under general instructions from the court to which it is attached and to which, from time to time, it reports its findings. The proceeding before a grand jury constitutes "a judicial inquiry", *Hale* v. *Henkel*, 201 U. S. 43, 66, of the most ancient lineage. See *Wilson* v. *United States*, 221 U. S. 361. The duration of its life, frequently short, is limited by statute. It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstructing the "orderly progress" of investigation should no more be encouraged in one case than in the other. That a grand jury proceeding has no defined litigants and that none may emerge from it, is irrelevant to the issue. The witness' relation to the inquiry is no different in a grand jury proceeding than it was in the *Alexander* case. Whatever right he may have requires no further protection in either case than that afforded by the district court until the witness chooses to disobey and is committed for contempt. See *Hale* v. *Henkel*, *supra*, and *Wilson* v. *United States*, *supra*. At that point the witness' situation becomes so severed from the main proceeding as to permit an appeal. To be sure, this too may involve an interruption of the trial or of the investigation. But not to allow this interruption would forever preclude review of the witness' claim, for his alternatives are to abandon the claim or languish in jail.

This analysis of finality is illustrated by *Perlman* v. *United States*, 247 U. S. 7.[5] There, exhibits owned by Perlman and impounded in court during a patent suit were, on motion of the United States attorney, directed to be produced before a grand jury. Perlman petitioned the district court to prohibit this use, invoking a constitutional privilege. This petition was denied and Perlman sought review here. The United States claimed that the action of the

[5] Compare Go Bart Co. v. United States, 282 U. S. 344.

district court was "not final" but merely interlocutory and therefore not reviewable by this Court. We rejected the Government's contention. To have held otherwise would have rendered Perlman "powerless to avert the mischief of the order . . . ." 247 U. S. at 12. Perlman's exhibits were already in the court's possession. If their production before the grand jury violated Perlman's constitutional right then he could protect that right only by a separate proceeding to prohibit the forbidden use. To have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his constitutional claim. Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes.[6]

One class of cases dealing with the duty of witnesses to testify presents differentiating circumstances. These cases have arisen under § 12 of the Interstate Commerce Act, whereby a proceeding may be brought in the district court to compel testimony from persons who have refused to make disclosures before the Interstate Commerce Commission.[7] In these cases the orders of the district court directing the witness to answer have been held final and reviewable. *Interstate Commerce Comm.* v. *Brimson*, 154 U. S. 447; *Harriman* v. *Interstate Commerce Com.*, 211 U. S. 407; *Ellis* v. *Int. Com. Comm.*, 237 U. S. 434. Such cases were duly considered in the *Alexander* case, and deemed to rest "on statutory provisions which do not apply to the proceedings at bar, and, while there may be resemblances to the latter, there are also differences." 201 U. S. at 121. The differences were thought controlling. Appeal from an order under § 12 was again here in the *Ellis* case, *supra*, fully argued in the briefs, and again differentiated from a situation like that in the *Alexander* case. "No doubt" was felt that an appeal lay from the

[6] Burdeau v. McDowell, 256 U. S. 465, is consistent with our analysis. In that case proceedings were commenced in the district court for the recovery of documents held by the Government for use before a grand jury. The district court granted the relief sought, and the Government appealed. In this Court the action of the district court was treated as final, and hence subject to review. But the practical considerations there involved were entirely different from those which must govern here. In Burdeau v. McDowell the action of the district court was itself an interruption of the grand jury's inquiry; appeal by the Government did not halt the "orderly progress" of the inquiry.

[7] 25 Stat. 858; 49 U. S. C. § 12.

district court's direction to testify. "It is the end of a proceeding begun against the witness"—was the pithy expression for this type of case. 237 U. S. at 442. And it is a sufficient justification for treating these controversies differently from those arising out of court proceedings unrelated to any administrative agency. The doctrine of finality is a phase of the distribution of authority within the judicial hierarchy. But a proceeding like that under § 12 of the Interstate Commerce Act may be deemed self-contained, so far as the judiciary is concerned—as much so as an independent suit in equity in which appeal will lie from an injunction without the necessity of waiting for disobedience. After the court has ordered a recusant witness to testify before the Commission, there remains nothing for it to do. Not only is this true with respect to the particular witness whose testimony is sought; there is not, as in the case of a grand jury or trial, any further judicial inquiry which would be halted were the offending witness permitted to appeal. The proceeding before the district court is not ancillary to any judicial proceeding. So far as the court is concerned, it is complete in itself.

We deem it unnecessary to say more in sustaining the Circuit Court of Appeals. The challenged judgment is

Affirmed.

Mr. Justice MURPHY did not participate in the consideration or decision of these cases.

A true copy.

Test:

Clerk, Supreme Court, U. S.